(7)

No. 83-6392-CFX
Status: GRANTED

Title: James Loudermill, Petitioner
v.
Cleveland Board of Education, et al.

Docketed:
March 7, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Vide:
83-1363
83-1362

Counsel for petitioner: Fertel, Robert M.

Counsel for respondent: Friedman, Stuart A., Maddox, John D.

Entry	Date	Note	Proceedings and Orders
1	Mar 7 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 11 1984		DISTRIBUTED. April 27, 1984
4	Apr 12 1984	X	Brief of respondents Cleveland Bd. of Ed., et al. in opposition filed.
6	May 4 1984		REDISTRIBUTED. May 10, 1984
9	May 11 1984		REDISTRIBUTED. May 17, 1984
10	May 21 1984		Petition GRANTED. The case is consoliated with 83-1362 and 83-1363 and a total of one hour is allotted for oral argument.
			**********
11	Jun 11 1984	G	Motion of James Loudermill for appointment of counsel filed.
13	Jun 11 1984		Order extending time to file brief of petitioner on the merits until July 19, 1984.
15	Jun 11 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
16	Jun 15 1984		DISTRIBUTED. June 21, 1984. (Motion of James Loudermill for appointment of counsel).
19	Jun 22 1984		REDISTRIBUTED. June 28, 1984. (MOTION OF JAMES LOUDERMILL FOR APPOINTMENT OF COUNSEL).
20	Jul 2 1984		Motion of James Loudermill for appointment of counsel GRANTED. and it is ordered that Robert M. Fertel, Esquire, of Cleveland, Ohio, is appointed pursuant to Rule 46.6 to serve as counsel for James Loudermill in these cases.
21	Jul 6 1984		Order further extending time to file brief of petitioner on the merits until July 30, 1984.
22	Jul 27 1984		Brief of petitioner James Loudermill filed.
23	Jul 27 1984		Joint appendix filed. VIDED.
24	Aug 10 1984		Record filed.
25	Aug 10 1984		Certified appendix & C.A. proceedings received.
26	Jul 30 1984		Brief amicus curiae of American Civil Liberties Union of Cleveland filed. VIDED.
27	Aug 12 1984	D	Motion of petitioner in No. 83-1362 for divided argument filed.
28	Aug 15 1984	D	Motion of petitioner in No. 83-1363 for divided argument filed.
29	Aug 27 1984		Brief of respondents Cleveland Civil Service Commission, et al. filed.
30	Sep 18 1984		Motion of petitioner in No. 83-1362 for civiced argument DENIED.

No. 83-6392-CFX

Entry	Date	Note	Proceedings and Orders
31	Sep 18 1984		Motion of petitioner in No. 83-1363 for divided argument DENIED.
32	Oct 11 1984		CIRCULATED.
33	Oct 22 1984		SET FOR ARGUMENT. Monday, Dec. 3, 1984. This case is consolidated with Nos. 83-1362, 1363. (1st case)(1 hour).
34	Nov 8 1984	D	Motion of City Respondents in No. 83-6392 for correction of caption and for divided argument filed.
35	Nov 26 1984		Motion of City Respondents in No. 83-6392 for correction of caption and for divided argument DENIED.
36	Dec 3 1984		ARGUED.

(6)

83-6392

No. ~~83-1362~~

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LOUDERMILL,
Cross-Petitioner

- vs -

THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

I. Is a discharged civil service employee, who has a property interest in his employment, and who was denied any pretermination procedures, denied due process of law as guaranteed by the Fourteenth Amendment when a nine (9) month period expired between the time of his termination and a decision of his posttermination administrative appeal?

II. Is a discharged civil servant's Fourteenth Amendment's liberty interest violated when unproven and unjustified references alleging dishonesty are disseminated among potential employers during the nine (9) months elapsing between his termination and the decision of his posttermination administrative appeal, which foreclosed and stifled his opportunity for other employment?

PARTIES

See page II of the original Petition For Certiorari.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1362

JAMES LOUDERMILL
Cross-Petitioner
- vs -
THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James Loudermill cross-petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review part of the judgment entered by that court against him.

OPINIONS BELOW

See page 1 of the original Petition For Certiorari. The opinion of the Court of Appeals is reported at 721 F. 2d 550.

JURISDICTION

This cross-petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on November 17, 1983.

The Petition For Certiorari was received by counsel for the Cross-Petitioner on February 20, 1984, and the present cross-petition was filed within thirty (30) days of that date pursuant to Rule 19.5 of this Court.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL ISSUES INVOLVED

See page 2 of the original Petition For Certiorari.

STATEMENT OF THE CASE

See pages 4 and 5 of the original Petition For Certiorari.

This cross-petition asks this Court to review the Court of Appeals' judgment affirming the Dsitrict Court's order dismissing Cross-Petitioner's claims of excessive delay in the post-termination hearing and a denial of a liberty interest.

FACTS

Cross-Respondent's (Petitioner's) statement of the Facts leaves holes of lacking information that this Cross-Petitioner (Respondent) feels compelled to fill.

After his termination, the Cross-Petitioner did have a full evidentiary hearing before a Referee of the Cleveland Civil Service Commission. As an outcome of that hearing, the Referee made a report recommending that the Cross-Petitioner be reinstated. Specifically contained in the report was a finding that Respondent had honestly made a mistake concerning his conviction of a crime.

The Cross-Respondent objected to the Referee's report and perfected an appeal to the full Cleveland Civil Service Commission.

On July 20, 1981, oral argument only was presented to the Commission, and no new evidence was heard by them. Accordingly, the Commission had no independent factual basis for reversing the Referee's findings in their 3-2 decision which reversed the Referee and upheld his termination.

Instead of pursuing his state court appellate remedies, Cross-Petitioner sought relief in the federal court system by filing his Complaint on October 27, 1981. Therein, Cross-Petitioner sought certification as a class action, as well as injunctive and declaratory relief that Ohio Revised Code Sec. 124.34 was unconstitutional on its face and as applied, in that there was no provision for pretermination procedures, nor sufficient post-termination procedures required by the due process clause of the Fourteenth Amendment.

From the time of his summary termination on November 3, 1980 until August 10, 1981 (when the Commission filed its decision), nine months had elapsed.

The Cross-Petitioner failed to perfect an appeal of the decision of the Commission to the Court of Common Pleas of Cuyahoga County, Ohio, as his administrative appeal had lasted nine months, and he was financially unable to proceed through lengthy and expensive state court appeals.

He was not required to exhaust his state court remedies when the delay involved therein was part of his federal constitutional claims, Barry v. Barchi, 443 U.S. 55, 63, n. 10 (1979), and his termination, as claimed by the Cross-Respondent, was not valid and final.

ARGUMENT

Question I

Ohio Revised Code Sec. 124.34 (pages 2-4 of the original Petitition) provides that an appeal from a termination order of a classified civil service employee shall be heard within thirty (30) days after the notice of an appeal is filed. However, the Ohio courts have held such a requirement to be directory and not mandatory. In re Bronkar, 53 Ohio Misc. 13, 17 (1978).

The Cross-Petitioner's appeal in the present case was not completed until nine (9) months after his notice of appeal was filed.

The Cross-Petitioner also requests this Court to take judicial notice that the issue of the unconstitutional delay in the disposition of post-termination appeals was accepted for review in the case of Davis v. Scherer, U.S. Supreme Court Case No. 83-490.

The length of a delay in an administrative proceeding is an important factor in determining whether the procedure complies with the procedural requirements of the Due Process Clause of the Fourteenth Amendment. Fusari v. Steinberg, 419 U.S. 375, 386 (1975). Administrative proceedings have been held to be unconstitutional because of excessive delays. Gibson v. Berryhill, 411 U.S. 564, 575, n. 14 (1973). The Respondent's interest in continued employment is a substantial one, Logan v. Zimmerman Brush Co., et al.., 455 U.S. 426, 434 (1982); and once he was terminated, his interest in having his appeal heard promptly was substantial, Barry v. Barchi, supra. The Respondent had a right to have his appeal timely decided by the Commission, Gibson v. Berryhill, supra, p. 577, which right was denied him.

The Court of Appeals held that the Respondent could have filed a petition for a writ of mandamus in order to obtain an expedited review of his appeal. However, this Court has recently held that the ability of a party to protect his own interests does not alleviate the government's responsibility of providing individuals with basic due process requirements where deprivation of life, liberty or property are involved. Mennonite Board of Missions v. Adams, ___U.S.___, 103 S. Ct. 2706, 2712 (1983).

The plurality opinion in Arnett v. Kennnedy, 416 U.S. 134, 158 (1975), held that a delay in processing an appeal of a termination of three (3) months was not excessive. However, the delay involved herein in processing the Cross-Petitioner's appeal was three times as long as the delays involved in Arnett v. Kennedy, supra.

This Court held in Mathews v. Eldridge, 424 U.S. 319, 341-342 (1976), that a ten to eleven month delay in affording post-termination hearings was not excessive. However, that case dealt with the termination of Social Security Disability benefits,

while the present case deals with a termination of wages, the receipt of which are an important part of our economic system. Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969). Also, the original determination in Mathews v. Eldridge, supra, was a medical one, which could easily be made by reading reports prepared by a physician, and were reliable. The termination of a public employee, who has a property interest in his continued employment, is based upon a consideration of fault.

Therefore, the credability of witnesses is important, and the submission of written responses is not reliable. Califano v. Yamaski, 442 U.S. 682, 697 (1979). The Respondent presented a good faith defense: He thought he had been convicted of a misdemeanor, and so, the present case can be distinguished from Mathews v. Eldridge, supra.

If irreparable injury may result from a deprivation of a protected property interest pending a final adjudication, due process requires that the party whose property is taken be given some opportunity for some kind of predeprivation or prompt post-deprivation hearing. Commissioner v. Shapiro, 424 U.S. 614, 629 (1979). Also, the deprivation of property can be accomplished only after an informal hearing; but then, the full evidentiary hearing must be held promptly thereafter. Barry v. Barchi, supra, p. 72 (Brennan, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). A nine month delay in the determination of an appeal is not a prompt hearing.

Additionally, the fact that the delay in determining the Respondent's appeal herein may have been inadvertent does not prevent the excessive delay from being in contravention of the Due Process Clause. Parratt v. Taylor, 451 U.S. 527, 534 (1981).

Question II

The Court of Appeals held that the terminated public employee is not denied a liberty interest protected by the Due Process Clause if the reasons for his termination are not published. However, it is not the defamation that creates the constitutional protections, but the deprivation of a right or status previously recognized by state law. Paul v. Davis, 424 U.S. 693, 708-709 (1976). This Court stated in Roth v. Board of Regents, 408 U.S. 564, 573 (1972):

> "...there is no suggestion that the State in declining to re-employ the respondent imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."

A terminated public employee is denied a liberty interest if the reasons for his termination impair his reputation for honesty and morality. Vanelli v. Reynolds School District No. 7, 667 F. 2d 773, 777 (C.A.11, 1982). The court in Vanelli, supra,

held that the procedural protections of the Due Process Clause are required whenever the accuracy of the charges is contested, and there is some public disclosure, and the latter requirement was fullfilled when the employee was foreclosed from other employment opportunities because of the reasons for termination.

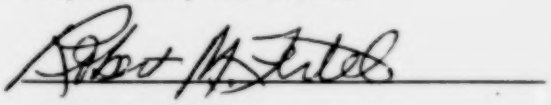
Under the common law of defamation, the requirements of publication are satisfied if the false allegations are communicated in any manner to another person. Since it is the alteration of a right or status protected by state law that is sufficient to invoke the procedural guaranties contained in the Due Process Clause, Paul v. Davis, supra, p. 708, the Respondent was denied a liberty interest when the reasons for his termination were communicated to other prospective employers, which foreclosed him from other employment opportunities.

CONCLUSION

The Cross-Petitioner was denied due process of law by a nine month delay in the decision of his post-termination administrative appeal, and he was also denied a protected liberty interest when he was terminated for alleged dishonesty and foreclosed from other employment opportunities by the dissemination of the reasons for his termination to potential employers.

The Cross-Petitioner has legitimate grievances and reasons of great public interest warranting this Court granting his Cross-Petition for a Writ of Certiorari.

Respectfully submitted,



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83-6392

83-6392 (1)

Case No. 83-1362 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LOUDERMILL

Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.

Cross-Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT CLEVELAND CIVIL SERVICE COMMISSION

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21 pp

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1362

JAMES LOUDERMILL

Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.

Cross-Respondents

BRIEF OF CROSS-RESPONDENT CLEVELAND CIVIL SERVICE COMMISSION IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court below correctly held that a period of of less than nine months in which to hear and consider the appeal of a discharged employee is not so excessive as to constitute a denial of due process of law?

2. Whether a question as to alleged dissemination of references concerning an employee's honesty may be considered by this

Court when such question has not been raised before the Court of Appeals below?

FACTS

The relevant facts herein are uncontroverted. However, in describing the time during which his appeal was pending before the Cleveland Civil Service Commission, cross-petitioner consistently refers to the so-called nine-month "delay" before his appeal was "completed". This characterization unnecessarily confuses the issues before the Court, and accordingly, a chronological review of the relevant events may be helpful.

(1) November 12, 1980, Cross-petitioner's Notice of Appeal to the Civil Service Commission was filed. (Opinion of Manos, J., Appendix of Petitioner at A52.

(2) January 22, 1981, a hearing was scheduled before a referee appointed by the Com-

mission pursuant to Ohio Rev. Code Sec, 124.34, but was continued. (Id.)

(3) January 29, 1981, a hearing was held before the referee. (Id.)

(4) April 1, 1981, the referee filed his Report and Recommendation with the Civil Service Commission (Id.), in which he recommended that cross-petitioner be reinstated. The appointing authority, petitioner herein, objected to that Report and Recommendation, and accordingly, an appeal was perfected to the full Civil Service Commission. (Cross-petition, at 2).

(5) July 20, 1981, a hearing was held before the full Civil Service Commission, which then orally announced that it would affirm the dismissal of cross-petitioner. (Opinion of Manos, J., Appendix of Petitioner, at A52).

(6) August 10, 1981, the Civil Service Commission approved the findings of fact and conclusions of law affirming the discharge of

the findings of fact and conclusions of law affirming the discharge of cross-petitioner. (Id.)

(7) August 21, 1981, cross-appellant's attorneys were notified of the Commission's action by ordinary mail. The record discloses no appeal therefrom. (Id.)

Cross-petitioner considers the total period from the date his Notice of Appeal was filed (November 12, 1980) until the date of notification of the Commission's action (August 21, 1981), then complains that the cross-respondent, the Cleveland Civil Service Commission, deprived him of due process by interposing a nine-month "delay" before his appeal was "completed". It is submitted that the facts clearly establish otherwise.

Analyzing the several stages of the cross-petitioner's appeal to the Civil Service Commission, it is evident that the Commission considered that appeal and appointed a referee to hear it, and that

the hearing was held and a Report and Recommendation issued, all within twenty weeks of the filing of the Notice of Appeal. The balance of the so-called "delay" was occasioned by the subsequent objections to the Report and Recommendation filed by the appointing authority, the Petitioner herein. Furthermore, the record discloses that the decision of the Commission, to affirm the discharge of cross-petitioner, was made and announced at its meeting July 20, 1981, one month before the date referred to by cross-petitioner. The additional month was needed to comply with formal requirements as to preparation and adoption of findings of fact and conclusions of law and a vote approving the minutes thereof.[1/]

1/ In fact, with administrative appeals available under Ohio law (Rev. Code Sec. 124.34), the appeal was not "completed" even then, but could have continued through Ohio courts for years thereafter.

REASONS FOR DENYING THE WRIT

I

The Courts Below Properly Found That A Period Of Less Than Nine Months Is Not An Excessive Time In Which To Hear, Consider, And Rule Upon An Administrative Appeal From Termination From Public Employment.

The case law submitted by cross-petitioner utterly fails to provide any support for his contention that the nine months between the filing of his Notice of Appeal and the decision of the Civil Service Commission affirming his discharge constituted a denial of a prompt post-termination remedy and thus, a denial of due process of law.

While it is conceded that a person may have a property right in his continued employment, and that even an inadvertent denial of due process may be actionable, cross-petitioner has provided no argument and no precedent to support his contention that the time during which his appeal was before the Civil Service Commission constituted such a denial. Those cases which he has cited,

without exception, either are distinguishable on their facts or actually contradict cross-petitioner's own arguments.

Arnett v. Kennedy, 416 U.S. 134 (1975), like the present case, concerns a post-termination hearing for a discharged employee. The Court held that a period of three months to affirm that discharge was not excessive.

Fusari v. Steinberg, 419 U.S. 379 (1975) concerned a hearing as to termination of unemployment benefits. Mathews v. Eldridge, 424 U.S. 319 (1976) involved a hearing as to termination of Social Security Disability benefits. [2] Goldberg

---

[2] Cross-petitioner concedes that this Court held in Mathew, supra, that: ... a ten to eleven month delay in affording post termination hearings was not excessive." Cross-petition, at 3. Actually, as the Court stated in Mathew, supra, at 342, "Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after hearing exceeds one year." Emphasis added.

v. Kelly, 397 U.S. 254 (1970) arose from a termination of welfare benefits. In all three cases, the Court noted the draconian effect of the loss of benefits upon the recipient. As the Court commented in Goldberg, supra, at 264:

> (T)he crucial factor in this context--a factor not present in the case of ... the discharged government employee ... -- is that termination of aid pending resolution of a controversy over elgibility may deprive an eligible recipient of the very means by which to live while he waits.

This language was cited with approval in Arnett vs. Kennedy, supra, concurring opinion of Powell, J., at 169, in which he observed that a discharged public employee, unlike a terminated welfare recipient, may have independent resources to see him through the period of his appeal, may be able to secure alternative private-sector employment, and as a last resort may be eligible for welfare benefits. Thus, this Court has made it clear consistently that the

need for a prompt disposition of an appeal is substantially greater in cases involving termination of government benefits than in those involving termination of government employment--contrary to the argument proposed by cross-petitioner. If one year or more is not an excessive period for consideration of an appeal of termination of disability benefits, certainly less than nine months is not an impermissibly long period for a multi-stage appeal process as to discharge from public employment.

Petitioner notes, at 14, that this Court recently granted certiorari, "... to consider the constitutionality of similar pre-termination and post-termination procedures for Florida Civil Service employees." Scherer v. Davis, 523 F.Supp. 4 (N.D. Florida 1981), affirmed without opinion, 710 F.2d 838 (11th Cir. 1983), cert. granted sub nom. Davis v. Scherer, Case No. 83-490, 52 U.S.L.W. 3449 (December 12, 1983).

Cross-petitioner also cites Scherer, but in support of his request that this Court "...take judicial notice that the issue of the unconstitutional delay in the disposition of post-termination appeals was accepted for review. ..." Cross-respondent submits that this is an inaccurate and misleading characterization of Scherer. In that case, the District Court had before it Sec. 110.061, Florida Statutes (1977), together with its implementing rules, which it found to be unconstitutional:

> ...insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee deemed

to have been dismissed without just cause.[3/]

With respect to the post-termination procedures at issue here, there has been no suggestion that the Ohio statute, Rev. Code Sec. 124.34, fails to provide a prompt post-termination hearing. To the contrary, the substance of the cross-petition is the assertion, at 3, that cross-petitioner's appeal "... was not completed until nine (9) months after his notice of appeal was filed." Emphasis added. Furthermore, cross-petitioner concedes that this length of time exceeded the time in which Ohio Rev. Code Sec. 124.34 directs that such appeal be heard.

3/ Unlike the Florida statute before the Court in Scherer, supra, cross-respondent notes that under Ohio law an employee who has been wrongfully discharged is entitled to reinstatement with all back pay' and benefits restored. State, ex rel. Colangelo v. McFaul, 62 Ohio St. 2d 200 (1980); State, ex rel. Hamlin v. Collins, 65 Ohio St. 63 (1981); State, ex rel. Kabatek v. Stackhouse, 66 Ohio St. 2d 64 (1981).

Gibson v. Berryhill, 411 U.S. 564, 575, n.14 (1973), cited by cross-petitioner as supporting his contention that "Administrative proceedings have been held to be unconstitutional because of excessive delays," in fact holds only that excessive delays by an administrative agency may make such remedies inadequate so as to obviate the exhaustion requirement. He cites that case further, supra, at 577, for the proposition that he "... had a right to have his appeal timely decided by the Commission." That citation, however, merely holds that abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971):

> ... contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.

Cross-petitioner's reliance upon Barry v. Barchi, 443 U.S. 55 (1979), is similarly misplaced, in that that case dealt with the suspension of a horse trainer by the New York State Racing and Wagering Board, in which by statute the trainer had no means by which to challenge his suspension until the disciplinary action had become final. By contrast, however, and as noted by the Court of Appeals herein (Appendix of Petitioner, at A29), Ohio Rev. Code Sec. 124.34 provides a mechanism for prompt review. If the period required for such review exceeded the time provided by statute, cross-petitioner clearly had a right to petition in mandamus or procedendo in order to expedite that process.

Cross-petitioner argues that the availability of mandamus "... does not alleviate the government's responsibility of providing individuals with basic due process requirements where deprivation of life, liberty or property are in-

volved," citing Mennonite Board of Missions v. Adams, _____ U.S. _____, 103 S.Ct. 2706, 2712 (1983). Clearly, on its facts that case is totally inapposite here. The constitutional obligation there was the duty to provide notice to a creditor of an impending tax sale; the Court held that neither notice by publication and posting nor mailed notice to the property owner is sufficient to give the mortgagee actual notice, where the owner is not in privity with his creditor and has failed to take steps necessary to protect his own interests. Here, to the contrary, cross-petitioner was aware throughout the proceedings of his status and of what remedies were available to him. He may not simply rest upon his rights and allow time to pass, then complain that the passage of time violated those rights.

II

The Question Of Alleged Dissemination Was Not Raised Before The Court Of Appeals And Is Not Supported By The Record Before This Court And Thus Should Not Be Considered Here.

Cross-respondent, Cleveland Civil Service Commission, submits that the second question proposed for review in the cross-petition is not properly before this Court, in that it is not set forth in the record below and thus, is not subject to review.

Furthermore, the record below does disclose that, ultimately, cross-petitioner was terminated on the basis of the charges brought against him, and fails to show any appeal therefrom. Accordingly, and cross-petitioner's protestions to the contrary notwithstanding, any references to his honesty which may have been made were both proven and justified by a judgment which was not appealed, and which this is now final.

Finally, there is nothing in the cross-petition alleging that any such references were disseminated by the cross-respondent Cleveland Civil Service Commission. Cross-petitioner has not given any basis for any claimed liabilty for such alleged references, and it is submitted that none exists.

CONCLUSION

The cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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(7) (6) (2)

Nos. 83-1362, 83-1363 & 83-6392

In the Supreme Court of the United States

October Term, 1983

THE CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

JAMES LOUDERMILL, *et al.*

PARMA BOARD OF EDUCATION,
Petitioner,

vs.

RICHARD DONNELLY, *et al.*

JAMES LOUDERMILL,
Petitioner,

vs.

THE CLEVELAND BOARD OF EDUCATION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

Counsel for Parties on Inside Cover

Petitions for Certiorari in Nos. 83-1362 and 83-1363 Filed February 14, 1984; Petition for Certiorari in No. 83-6392 Filed March 7, 1984
Certiorari Granted May 21, 1984

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 521-3647

24pp

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

I. Loudermill Case:

10/27/81	1	AFFIDAVIT of Pltf., to proceed in forma pauperis filed.
11/ 6/81	2	MEMORANDUM of Opinion, denying pltf's motion to proceed in forma Pauperis; the case is dismissed with prejudice for failure to state a claim upon which relief can be granted; the court hold the delay which occurred in processing Loudermill's appeal in the instant case does not constitute a violation of his procedural due process rights filed. Manos, J.—copies mailed (noted 11/9/81)
11/ 6/81	3	ORDER, pursuant to the Memorandum of Opinion, issued on this date, the Pltf's motion to proceed in forma pauperis is denied & the case is dismissed with prejudice filed Manos, J. copies mailed (noted 11/9/81)
11/16/81	4	MOTION of Pltf., for a new trial or to alter or amend Judgment, with brief in support and exhibits in support filed. copies mailed 11/16/81
1/19/82	5	SUPPLEMENTAL BRIEF of pltfs. in support of their motion for a new trial or to alter or amend judgment filed. Copy mailed 1/19/82

2/22/82	6	MEMORANDUM OPINION & order denying pltfs.' joint motion to alter or amend court's previous decision filed. Manos, J. (2/22/82)
2/22/82	7	ORDER denying pltfs.' joint motion to alter or amend judgment filed. Manos, J. (2/22/82).
3/23/82	8	NOTICE of Appeal filed re: 2/22/82. c/m Hickey, (by Pltf.) and USCA. (notice to deft. indiv.)
3/23/82	9	MOTION of Pltf. to proceed in forma pauperis filed. c/m 3/23/82. with affidavit attached.
3/29/82	10	MEMORANDUM of opinion denying pltf's. motion to leave to proceed in forma pauperis to USCA. Manos, J.
3/29/82	11	ORDER denying pltf. motion for leave to appeal in forma pauperis to USCA. Manos, J.
4/ 6/82		CERTIFIED original pleadings mailed to Clerk, USCA.
4/21/82		ACKNOWLEDGEMENT of Transmission form from USCA case no. 82-3227 filed in USCA 3/29/82, filed.
12/13/83		MANDATE from U.S.C.A. (issued: 12/9/83) before: Merritt, Wellford, & Timbers, C.J., on judgment entry that this case be and the same is hereby affirmed in part; vacated and remanded in part filed. Costs: Pending
12/13/83		OPINION filed.

RELEVANT DOCKET ENTRIES

II. Donnelly Case:

10/27/81	1	COMPLAINT filed.
10/27/81	2	INITIAL ORDER filed. Manos, J. (noted 10/27/81)
10/27/81		SUMMONS issued. 7 copies of complaints Notices re: Magistrates, Initial Orders and summons to U.S.Marshal.
11/ 6/81	3	MEMORANDUM of Opinion dismissing Pltf's complaint for failure to state a claim upon which relief can be granted; this Court hold Donnelly's allegation fails to state a claim of constitutional dimension under 42 U.S.C. §1983 filed. Manos, J. - copies mailed (noted 11/9/81)
11/ 6/ 81	4	ORDER, pursuant to the Memorandum of Opinion issued on this date, the Pltf's complaint is dismissed filed. Manos, J. - copies mailed (noted 11/9/81)
11/16/81	5	MOTION of Pltf., for a new trial or to alter or amend Judgment, with brief in support & exhibits in support filed. copies mailed 11/16/81 (See C81-2132)
11/20/81	6	SUMMONS returned and filed. - Served Ralph Scheel, 11/2/81; served Parma Board of Education 11/2/81; Served Mayor of City of Parma, John Petruska 11/2/81; served Leo Hepner 11/2/81; served Parma Civil Service Commis-

		sion 11/2/81 served Donald Narus. FEES: $86.00
12/ 8/81	7	SUMMONS returned & filed. - Re: William J. Brown, Atty. General of Ohio Unexecuted - FEES: $3.00
1/19/82	8	SUPPLEMENTAL BRIEF of pltfs. in support of their motion for a new trial or to alter or amend judgment filed. Copy mailed 1/19/82
2/ 4/82	9	NOTICE of John T. Meredith of Appearance on behalf of deft. Board of Education of the Parma City School District filed. Copy mailed 2/4/82.
2/22/82	10	MEMORANDUM OPINION & order denying pltf.'s joint motion to alter or amend previous decision filed. Manos, J. (See 81-2132)
2/22/82	11	ORDER denying pltfs.' joint motion to alter or amend judgment filed. Manos, J. (See 81-2132).
3/23/82	12	NOTICE of Appeal filed re: 2/22/82. C.M. Hickey & Fertel, Meredith and USCA. filed.
4/ 6/82		CERTIFIED original pleadings mailed to Clerk, USCA
4/ 2/82		Letter of City of Parma to list Mr. Boyko and Mr. Bond as Counsel for City of Parma, filed. (n.4/6/82)
4/21/82		ACKNOWLEDGEMENT of Transmismission form from USCA case no. 82-3226 filed in USCA 3/29/82, filed.

12/13/83	MANDATE from U.S.C.A. (issued: 12/9/83) before: Meritt, Wellford, & Timbers, C.J. Judgment entry that this case be and the same is hereby affirmed in part; vacated and remanded in part filed. Costs: Pending.
12/13/83	OPINION filed.

Case No. C81-2132

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES LOUDERMILL, Individually and on behalf of all others similarly situated,
Plaintiff,

vs.

CLEVELAND BOARD OF EDUCATION JOHN GALLAGHER, PRESIDENT, Individually and on behalf of all others similarly situated,

and

CITY OF CLEVELAND GEORGE V. VOINOVICH, MAYOR, Individually and on behalf of all others similarly situated,

and

CLEVELAND CIVIL SERVICE COMMISSION THOMAS R. SKULINA, PRESIDENT, Individually and on behalf of all others similarly situated,

and

WILLIAM J. BROWN Attorney General, State of Ohio,
Defendants.

COMPLAINT FOR MONETARY INJUNCTIVE AND DECLARATORY RELIEF

(Affidavit of Plaintiff to proceed in forma pauperis filed October 27, 1981)

[2] JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 United States Code Sections 1343 (3) and 4, 2201,

and 2202. This is an action for damages, injunctive and declaratory relief authorized by 42 United States Code Section 1983 to be commenced by the Plaintiff and the class he represents, as a citizen of the United States, to redress the deprivation, by Defendants' actions under color of Ohio Revised Code Section 124.34, of rights served by the Fourteenth Amendment to the Constitution of the United States.

2. Jurisdiction is also conferred on this court by 28 United States Code Section 1331 this being a suit wherein the matter in controversy exceeds the sum of Ten thousand dollars ($10,000.00), exclusive of interest and costs, arising under the Constitution and laws of the United States.

PARTIES

3. The Plaintiff is a resident of the City of Cleveland, County of Cuyahoga and State of Ohio and is a citizen of the United States and was a classified civil service employee pursuant to the laws of the State of Ohio.

4. Defendant Cleveland Civil Service Commission is an organizational division of the Defendant City of Cleveland.

5. Defendant Cleveland Board of Education is an appointing authority pursuant to the civil service laws of the State of Ohio.

6. Defendant William J. Brown is the Attorney General of the State of Ohio and is named as a party defendant in this action solely because the constitutionality of a certain Ohio Statute is being drawn into question. None of the allegations that follow apply to William J. Brown and no relief is sought against him.

CLASS ACTION

7. Plaintiff brings this action pursuant to Rules 23 (a), 23 (b)(4)(B) and 23 (b)(2) of the Federal Rules of Civil Procedure. Plaintiff's class [3] consists of all classified civil service employees in the State of Ohio who have been or who could be suspended or removed from their employment without sufficient due process procedures.

8. Defendant Cleveland Board of Education represents all appointing authorities in the State of Ohio pursuant to the Ohio Civil Service laws who have failed or who will fail to provide sufficient due process procedures prior to the removal or suspension of classified civil service employees.

9. Defendant Cleveland Civil Service Commission represents all civil service commissions in the State of Ohio who have failed or who will fail to afford sufficiently prompt hearings under the due process clause for removed or suspended civil service employees.

10. Plaintiff's class is so numerous as to make it impracticable to bring them all before the court, there are questions of law and fact common to the class, the claims of the plaintiff are typical of the claims of the class, and he will fairly and adequately protect the interests of the class.

11. The Defendants' classes are so numerous as to make it impracticable to bring them all before this Court, there are questions of law and fact common to the member of the classes, the defenses of the Defendants are typical of the defenses of the classs, and the Defendants will fairly and adequately protect the interests of the class.

CAUSE OF ACTION

12. The Plaintiff worked in the summer of 1979 as a security guard for a private security firm which provided guards to the Cleveland City School District under contract.

13. Said firm went defunct and the plaintiff began working for the defendant Cleveland Board of Education on September 22, 1979.

14. On September 25, 1979 the plaintiff filled out an application for a non-teaching position as a security guard with said defendant.

[4] 15. The plaintiff stated in said application that he had never been convicted of a felony and he was hired as a security guard with the Business Department of the Defendant Cleveland Board of Education. The plaintiff was a classified civil service employee pursuant to the civil service laws of the State of Ohio who had a legitimate claim of continued employment absent sufficient "cause" for removal.

16. On September 1, 1980 the plaintiff was transferred to the jurisdiction of the newly formed Department of Safety and Security.

17. A record check was conducted on all employees in said department in October, 1980 which revealed that the plaintiff was convicted of grand larceny in 1968.

18. On November 3, 1980, George Mazzaro, Business Manager for the Defendant Cleveland Board of Education sent a letter to the plaintiff advising him that he was being removed from his employment for dishonesty.

19. The plaintiff was not given any opportunity prior to his removal to respond to the charges against him

although he had a legitimate defense since he thought that he was convicted of a misdemeanor.

20. The plaintiff filed a Notice of Appeal of his removal with the defendant Cleveland Civil Service Commission on November 12, 1980. A hearing before a referee of said defendant was originally scheduled for January 22, 1981 but was continued until January 29, 1981 when a hearing was actually held.

21. The referee filed and served his recommendations on or about April 1, 1981. A hearing was held before the full civil service commission on July 20, 1981 which announced its decision that it would affirm the plaintiff's removal.

22. The defendant Cleveland Civil Service Commission approved a proposed findings of fact and conclusions of law on August 10, 1981 and advised plaintiff's attorneys of said fact by letter dated August 21, 1981.

[5] 23. The plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the defendants Cleveland Board of Education and Cleveland Civil Service Commission when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution to his claim that his removal was unlawful and unfair.

24. The plaintiff suffered loss of compensation and other benefits, plus mental distress and anguish, anxiety, humiliation and embarrassment and loss of credit and reputation. The plaintiff has been prevented from obtaining suitable employment because of the reasons of his removal and the record thereof.

25. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

26. Ohio Revised Code Section 124.34 is unconstitutional as applied because the thirty (30) day time limit for an appeal hearing has been determined not to be mandatory and because classified civil service employees are not given sufficiently prompt post-removal or post-suspension hearings.

WHEREFORE, the plaintiff prays for the following relief:

1. That he be reinstated to his position and awarded his back-pay and other benefits plus simple interest for the time that he was unlawfully deprived of his employment, and

2. Compensatory damages in the amount of One hundred thousand dollars ($100,000.00), and

3. A judgment declaring Ohio Revised Code Section 124.34 unconstitutional on its face and as applied, and

4. Preliminary and Permanent Injunctions prohibiting the removal or suspension of classified civil service employees without full compliance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, and

[6] 5. Preliminary and Permanent Injunction ordering reinstatement with full back pay and other benefits plus interest; and

6. Certification of this case as a class action; and

7. That the Defendants be ordered to pay the plaintiff for his costs in prosecuting this case including a sum for his reasonable attorney fees.

HICKEY LEGAL CLINIC
3794 West 25th Street
Cleveland, Ohio 44109
(216) 749-6556

By: JOHN W. HICKEY and ROBERT M. FERTEL
Attorneys at Law

Case No. C81-2133

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD DONNELLY, Individually and on behalf of all others similarly situated,
Plaintiff,

vs.

PARMA BOARD OF EDUCATION ROBERT M. KOSCIELNY, PRESIDENT Individually and on behalf of all others similarly situated,

and

CITY OF PARMA JOHN PETRUSKA, MAYOR, Individually and on behalf of all others similarly situated,

and

PARMA CIVIL SERVICE COMMISSION LEO HEPNER, CHAIRMAN, Individually and on behalf of all others similarly situated,

and

LEO HEPNER,

and

RALPH SCHEEL,

and

DONALD NARUS,

and

WILLIAM J. BROWN, Attorney General, State of Ohio,
Defendants.

COMPLAINT FOR MONETARY INJUNCTIVE AND DECLARATORY RELIEF

(Filed October 27, 1981)

[2] JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 United States Code Sections 1343 (3) and 4, 2201. This is an action for damages, injunctive and declaratory relief authorized by 42 United States Code Section 1983 to be commenced by the Plaintiff and the class he represents, as a citizen of the United States, to redress the deprivation, by Defendants' actions under color of Ohio Revised Code Section 124.34, of rights served by the Fourteenth Amendment to the Constitution of the United States.

2. Jurisdiction is also conferred on this court by 28 United States Code Section 1331 this being a suit wherein the matter in controversy exceeds the sum of Ten thousand dollars ($10,000.00), exclusive of interests and costs, arising under the Constitution and laws of the United States.

PARTIES

3. The Plaintiff is a resident of the City of Independence, County of Cuyahoga and State of Ohio and is a citizen of the United States and was a classified civil service employee pursuant to the laws of the State of Ohio.

4. Defendant Parma Civil Service Commission is an organizational division of the Defendant City of Parma.

5. Defendant William J. Brown is the Attorney General of the State of Ohio and is named as a party defendant in this action solely because the constitutionality of a certain Ohio Statute is being drawn into question. None of the allegations that follow apply to William J. Brown and no relief [3] is sought against him.

7. Defendants Leo Hepner, Ralph Scheel and Donald Narus are members of the Parma Civil Service Commission and are sued individually and in their official capacities.

CLASS ACTION

8. Plaintiff brings this action pursuant to Rules 23 (a), 23 (b)(4)(B) and 23 (b)(2) of the Federal Rules of Civil Procedure. Plaintiff's class consists of all classified civil service employees in the State of Ohio who have been or who could be suspended or removed from their employment without sufficient due process procedures.

9. Defendant Parma Board of Education represents all appointing authorities in the State of Ohio pursuant to the Ohio Civil Service laws who have failed or who will fail to provide sufficient due process procedures prior to the removal or suspension of classified civil service employees.

10. Defendant Parma Civil Service Commission represents all civil service commissions in the State of Ohio who have failed or who will fail to afford sufficiently prompt hearings under the due process clause for removed or suspended civil service employees.

11. Plaintiff's class is so numerous as to make it impracticable to bring them all before the court, there are questions of law and fact common to the class, the claims of the plaintiff are typical of the claims of the class, and he will fairly and adequately protect the interests of the class.

12. The Defendants' classes are so numerous as to make it impracticable to bring them all before this Court, there are questions of law and fact common to the member of the classes, the defenses of the Defendants are typical of the defenses of the classes, and the Defendants will fairly and adequately protect the interests of the class.

CAUSE OF ACTION

13. The Plaintiff is a bus mechanic with the Defendant Parma Board of Education who is a classified employee pursuant to the civil service laws of [4] the State of Ohio who had a legitimate claim of continued employment absent sufficient "cause" for his removal.

14. The Plaintiff was advised by letter dated August 17, 1977 that he would be removed from his employment because of his failure to pass an eye-examination.

15. The Plaintiff was given no opportunity prior to his removal to respond to the charges against him except that he was permitted to take another eye-examination.

16. The Plaintiff had a legitimate defense to his removal because another employee who could not pass an eye-examination was not removed.

17. The Plaintiff's order of removal was not filed the Defendant Parma Civil Service Commission until September 9, 1977.

18. The Plaintiff filed a Notice of Appeal with said Defendant on August 31, 1977. Said Defendant refused to hear the Plaintiff's appeal because it was not filed within ten (10) days after the order of removal was mailed.

19. However the appeal period to the civil service commission pursuant to Ohio Revised Code Section 124.34 does not commence until the orders of removal is filed with civil service commission.

20. The plaintiff filed a Complaint for a writ of mandamus in the Cuyahoga County Court of Appeals on May 9, 1978, case number 39370. An alternative writ of mandamus was issued by Judge Corrigan.

21. At the hearing on the alternative writ of mandamus it was agreed that the plaintiff would have an appeal hearing within thirty (30) days.

22. Said hearing was conducted on May 30, 1978 and the Defendant Parma Civil Service Commission ordered the Plaintiff reinstated on July 6, 1978.

23. The Plaintiff was denied Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendant Parma Board of Education when another mechanic who could not pass an eye-examination was not removed.

24. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants [5] Parma Board of Education, Parma Civil Service Commission, and its individual members when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution of his claims that his removal was unlawful and unfair.

25. The Plaintiff was denied his rights to substantive time due process as guaranteed by the Fourteenth Amendment to the United States Constitution when the Defendant Parma Board of Education arbitrarily and discriminately removed him from his employment because the eye-examination was not reasonably related to his job duties.

26. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants Parma Civil Service Commission Leo Hepner, Ralph Scheel, and Donald Narus when said Defendants failed to follow established state procedures as described in this Complaint.

27. The Plaintiff suffered loss of compensation and other benefits, plus mental distress and anguish, anxiety, humiliation and embarrassment and loss of reputation.

28. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

29. Ohio Revised Code Section 124.34 is unconstitutional as applied because the thirty (30) day time limit for an appeal hearing has been determined not to be mandatory and because classified civil service employees are not given sufficiently prompt post-removal or post-suspension hearings.

WHEREFORE, Plaintiff prays for the following relief:

1. That he be awarded his back pay and other benefits plus simple interest for the time that he was unlawfully deprived of his employment; and

2. Compensatory damages in the amount of Twenty-five thousand dollars ($25,000.00); and

[6] 3. A judgment declaring Ohio Revised Code Section 12-.3- unconstitutional on its face and as applied; and

4. Preliminary and Permanent Injunctions prohibiting the removal or suspension of classified civil service employees without full compliance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution; and

5. Certification of this case as a class action; and

6. That the Defendants be ordered to pay the Plaintiff for his costs in prosecuting this case including a sum for his reasonable attorney fees.

Respectfully submitted,

HICKEY LEGAL CLINIC
3794 West 25th Street
Cleveland, Ohio 44109
(216) 749-6556

By: JOHN W. HICKEY and ROBERT M. FERTEL
Attorneys at Law

MATTERS CONTAINED IN PETITIONS FILED IN CASE NO. 83-1362 (LOUDERMILL) AND CASE NO. 83-1363 (DONNELLY)

No. 83-6392

In The

Supreme Court of the United States

October Term, 1983

JAMES LOUDERMILL
Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CROSS-PETITIONER

ROBERT M. FERTEL, *Court Appointed Counsel for James Loudermill, the Cross-Petitioner*
BERGER AND FERTEL
SANFORD J. BERGER, *of counsel*
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Phone: (216) 781-5950

Counsel for other parties on back cover

QUESTIONS PRESENTED

1. Is a discharged civil service employee, who has a property interest in his employment, and was denied any pretermination procedures, denied due process of law as guaranteed by the Fourteenth Amendment when a nine (9) month period expired between the time of his termination and a decision of his posttermination administrative appeal?

2. Is a discharged civil servant's Fourteenth Amendment's liberty interest violated when unproven and unjustified references alleging dishonesty are disseminated among potential employers during the nine (9) months elapsing between his termination and the decision of his posttermination administrative appeal, which foreclosed and stifled his opportunity for other employment?

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

No. 83-6392

In The
Supreme Court of the United States
October Term, 1983

JAMES LOUDERMILL
Cross-Petitioner
- vs -
THE CLEVELAND BOARD OF EDUCATION, et al.
Cross-Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CROSS-PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 721 F.2d 550, was rendered on November 17, 1983, and can also be found in Petitioner's Appendix in Case No. 83-1362 at A1-A33. The two Opinions of the District Court were rendered on November 6, 1981 and

February 22, 1982 respectively, and will be found in Petitioner's Appendix in Case No. 83-1362 at A34-A39 and A50-A62 respectively.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on November 17, 1983. Petitioner appealed to this Court on February 14, 1984, followed by Loudermill's Cross-Petition on March 8, 1984, both being granted on May 21, 1984. The jurisdiction of this Court resting upon 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Loudermill was a security guard for the Cleveland Board of Education and was a classified civil service employee who could only be terminated for "cause." He was terminated by a letter on November 3, 1980 for alleged dishonesty in filling out his employment application; without any prior opportunity, written or oral, before the Board of Education to contest the charges against him, although he had a legitimate defense; i.e., he honestly thought he had been convicted of a misdemeanor twelve years prior to his application (which asked if he had ever been convicted of a felony). Loudermill, through counsel, then filed a Notice of Appeal with the Cleveland Civil Service Commission on

November 12, 1980. The appointing authority, the Cleveland Board of Education, confirmed Loudermill's removal on November 13, 1980, but never filed an order of removal with the Commission. The Commission failed to disaffirm Loudermill's removal, although they were required to do so by Ohio Administrative Code Rule 124-03-01(B). A hearing was originally scheduled before a Referee of the Commission on January 22, 1981, but was continued until January 29, 1981 - almost three (3) months after Loudermill was removed. The Referee, who was a practicing, highly ethical, attorney filed his recommendations on April 1, 1981, recommending that Loudermill's removal be disaffirmed. A hearing before the full Commission was not held until July 20, 1981, more than eight (8) months after his Notice of Appeal was filed, and affirmed Loudermill's removal, although they heard no testimony. The Commission then instructed the Board of Education to prepare Findings of Fact and Conclusions of Law, and they were filed on August 10, 1981. Since a judicial appeal could not be taken until such filing, Loudermill could not disentangle himself from state administrative proceedings until nine (9) months after his discharge. Loudermill then filed a Complaint in federal

ccurt pursuant to the federal civil rights act for monetary, declaratory and injunctive relief, accompanied by Motion to Certify as a Class Action and for a Preliminary Injunction, and that Loudermill's case be consolidated with that of Richard Donnelly v. Parma Board of Education, et al., filed on the same day. Both cases were dismissed with prejudice by the District Court on November 6, 1981. Loudermill and Donnelly then filed a Motion to Alter or Amend Judgment on November 16, 1981, which was overruled by the trial court on February 22, 1982. They then filed timely Notices of Appeal to the Sixth Circuit Court of Appeals which affirmed the District Court's dismissal of Loudermill's complaint (which alleged that the delay in his post-termination hearings violated his liberty and due process rights), but vacated and remanded for further consideration the trial court's judgment that dismissed the pre-termination procedural due process claims of both Loudermill and Donnelly. Petitions for a Writ of Certiorari were then filed to this Court by The Cleveland Board of Education and the Parma Board of Education, followed by only Loudermill's Cross-Petition - all three appeals being accepted by this Court.

SUMMARY OF ARGUMENT

There are broad concepts or generalities that can be deduced from reading all the cases that have dealt with the concept of due process. As with all generalities, there are exceptions, so that it is near impossible to arrive at propositions of law that have the precision of the physical sciences. However, these concepts or generalities give insight into what are, and what are not, acceptable due process procedures:

1. The basic purpose of due process is to assure reliable determinations of official governmental actions depriving citizens of property or liberty interests.
2. The determination of due process requirements is directly proportional to the degree of traditional judicial fact-finding procedures involved in the deprivation.
3. The permitted length of the post-deprivation procedures is directly proportional to the reliability of the pre-deprivation procedures.

In addition to the case law on due process principles previously discussed, the constitutional word "deprived" is synonomous with the psychological word "loss," so that a constitutional infraction not only constitutes a physical loss to the deprived victim,

but a crippling emotional loss as well, resulting in governmental action impairing an individual's ability to perform as a free citizen. Emotional shackles are no less restrictive than shackles made of steel.

Additionally, once government places a cloud on someone's good name, reputation and character, there simultaneously occurs a governmental impairment of that person's liberty interest, preventing him or her from being unbiasedly judged in the marketplace, and that cloud progressively darkens as a full evidentiary hearing is delayed.

Finally, and of critical importance, Ohio has no statutory scheme or machinery which automatically provides due process protection by assuring either a pre or post deprivation hearing to a vested governmental employee.

ARGUMENT

"Justice delayed, is justice denied."

Counsel has often thought how expeditious it would be if this Court had its own private police force, and you could summon them to immediately respond when the federal constitution was being violated - in much the same manner that local police respond when there is a call that a criminal statute or ordinance has been breached. But, how dif-

ferent law and order would be if a call to the local police was a herculean task of time and money, and the response time was three to four years or longer - and then the odds were about 200 to 1 that your call would be completed.

And as you sit on the incredibly uncomfortable benches waiting for your client's name to be called, prior to an administrative review board hearing; you look around at the other occupants of the room and see the "Titanic Look" on their faces, as both you and they inwardly know that it's only a matter of time until you all go down. But, as you sit and wait, one thought prevails: PROTECT THE RECORD, because you know that when you say "Due Process, Fourteenth Amendment and Supreme Court of the United States," they don't know what you are talking about and couldn't care less.

Hang in there on principle alone, and hope that you can ultimately get to a federal court, as you have never been successful in a state court on a federal constitutional question. Finally, you file in federal court and draw a judge who has the lowest case load in the district, but probably the highest rate of dismissal, and so to the Circuit Court of Appeals - where someone finally

listens to you - but, of greater importance - understands what you have to say. And this is what you have to say.

The requirements of due process are flexible, and are to be determined by the circumstances involved in each case. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

The primary function of due process is to minimize the risk of erroneous decisions, see Mackey v. Montrym, 443 U.S. 1, 13 (1979), and the right to a hearing is not required when the initial decision is sufficiently reliable due to a minimized chance for wrongful deprivation. For example, please see Ingraham v. Wright, 430 U.S. 651, 677-678 (1977), where this Court refused to grant hearing rights to students subject to corporal punishment, becuase of an insignificant chance of abuse due to the openness of the classroom.

The distinction, as to when a hearing is, or is not required, is clearly shown in Califano v. Yamasaki, 442 U.S. 682 (1979). That case dealt with the authority of the Secretary of H.E.W. to recoup erroneous Social Security overpayments. The recipient was given the option to file for reconsideration of the Secretary's decision (that an

overpayment had been made), or he could ask the Secretary to waive his right to recoupment of such overpayments. It was decided therein that recipients who filed for reconsideration were not entitled to a hearing, because the decision was based upon a relatively straight forward computation. On the other hand, recipients who filed for a waiver were entitled to a hearing, since the decision was then based upon a broad "fault" standard, where credibility of witnesses was essential.

Central to the evaluation of any administrative procedure is the nature of the relevant inquiry. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 617 (1974). In Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 89-90 (1978), this Court held that students facing academic dismissals were not entitled to a due process hearing, as their dismissal was subjective, but evaluative of facts not in issue, distinguishing the case of Goss v. Lopez, 419 U.S. 565 (1975), which required a prior due process hearing for disciplinary suspensions, as there was a need for traditional fact finding.

In determining the extent of the required procedures, including the acceptable

delays in post-deprivation hearings, consideration must be given to whether the inquiry is sufficiently akin to traditional judicial fact-finding.

Cases where the credibility of witnesses are essential must be distinguished from those where it is not. Or to state the proposition in another manner: Where the credibility of witnesses is critical, there must be a sufficiently prompt post-deprivation hearing.

Therefore, the present factual situation of Loudermill must be distinguished from Mathews v. Eldridge, 424 U.S. 319 (1976), which upheld delays in the post-deprivation hearings for the termination of Social Security disability benefits of ten to eleven months, because the decision to terminate such benefits was based upon a medical assessment of the recipient's physical or mental condition, which in most cases turn upon a "routine, standard and unbiased medical report by a physician specialist," quoting from Richardson v. Perales, 402 U.S. 389, 404 (1971). Questions of credibility and veracity of witnesses were not involved in the Mathews v. Eldridge case; and, accordingly, there was no need for a prompt post-deprivation hearing.

As an example of the weight afforded an administrative hearing, it should be noted that res judicata is given effect to a finding of an administrative agency only when it acts in a traditional judicial capacity. See Kremer v. Chemical Construction Co., 456 U.S. 461, 484 n. 26 (1982); citing United States v Utah Construction and Mining Co., 384 U.S. 394 (1966).

Loudermill's case deals with a "broad fault standard which is inherently subject to factual determination and adversarial input." Mitchell v. W.T. Grant Co., supra, p. 617.

Evaluating fault usually requires an assessment of credibility, and written submissions are particularly inappropriate. See Califano v. Yamasaki, supra, p. 697. Therefore, the delay in the present case, where the resemblance of traditional fact-finding is unavoidable, must be contrasted with cases such as Mathews v. Eldridge, supra, where it is missing.

The rapidity of administrative review is a significant factor in assessing its constitutionality. See Fusari v. Steinberg, 419 U.S. 379, 389 (1975). If there are reliable pre-deprivation procedures available, then the time for the post-deprivation procedures is not nearly as critical as when reliable

pre-deprivation procedures are lacking. The length of the allowable post-deprivation delay is, therefore, directly proportional to the reliability of the pre-deprivation procedurers. The question of what is, or is not "reliable post-deprivation procedures" is how closely they resemble judicial fact-finding procedures.

This Court decided in Arnett v. Kennedy, 416 U.S. 134 (1976), that a pre-deprivation evidentiary hearing was not required prior to the termination of a non-probationary public employee. However, the employee therein was entitled to certain pre-deprivation procedures, such as the opportunity to present oral and written responses to the charges against him. As this Court said in Mackey v. Montrym supra, p. 13:

> And when prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as responsible governmental official warrants them to be.

In the present case, Loudermill did not have a prompt post-deprivation hearing to correct the administrative unfairness.

Parratt v. Taylor, 451 U.S. 527, 539 (1981), held that an individual may be deprived of his property without any pre-deprivation hearing only if there was a necessity for quick action by the State, or the impracticality of providing any meaningful pre-deprivation procedure. It then follows that if some pre-deprivation procedure (although not necessarily a full hearing) is essential in most cases, then a prompt post-deprivation full hearing must also be provided.

This Court has repeatedly held that where an individual may be deprived of his property after only an informal proceeding, then a full evidentiary hearing must be held promptly thereafter. See Barry v. Barchi, 443 U.S. 55, 72 (1979), (Brennan, J. concurring); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975), and Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

The purpose of the Ohio civil service statutes is to provide civil servants with prompt review of disciplinary actions against them by an agency with expertise in the area. See State, ex rel. Shine v. Garafolo, 69 Ohio St. 253, 256 (1982). Therefore, a terminated non-probationary civil servant must be given a prompt post-deprivation evidentiary hearing.

Of great concern to this writer, however, is the fact that the post-deprivation hearing provided for by Ohio statute isn't automatic; and for the unsophisticated civil servant, who must take affirmative action within ten (10) days of the date his discharge order is filed, or otherwise waive all chance for a hearing, the danger of there being no hearing at all is very real. Further, a ten (10) day statute of limitations seems totally unreasonable in light of the gravity of the interest involved.

One of the purposes of procedural due process is to give the individual, who has been deprived of his property, the feeling that he was treated fairly by the government. See Carey v. Piphus, 435 U.S. 247, 262(1978).

This Court has held that long delays in criminal cases may subject the accused to emotional distress. Strunk v. United States, 412 U.S. 434, 439 (1973). Counsel will discuss this aspect of long delay in his Liberty Interest argument, infra, but suffice it to say, at this point, that the trauma is quite comparable.

The temporary loss of income, ultimately hoped to be recovered, does not usually constitute irreparable injury. See Sampson v. Murray, 415 U.S. 61, 90 (1974). However,

lengthy delays in the post-termination proceedings not only cause psychological damage, but the employee may be incapable of getting employment in the private sector. Arnett v. Kennedy, supra, p. 194, (White, J. concurring in part and dissenting in part.)

In Arnett v. Kennedy, supra, p. 169, Justice Powell distinguished the case of the termination of a public employee from the case of Goldberg v. Kelly, supra, which dealt with the termination of welfare benefits, by stating:

> Indeed, as the Court stated in that case "the crucial factor in this context - a factor not present in the case of ..... the discharged government employee .. is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits" Id. at 264 (emphasis added). By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

However, the issue in Arnett v. Kennedy, supra, was whether or not a pre-termination

evidentiary hearing was required. Therein, Justice Powell based his opinion upon a balance of the government's interest in removing an inefficient employee with the employee's interest in continuing his employment. However, once an employee is terminated, the governmental interest in removing the non-productive employee becomes moot.

The Court of Appeals herein held that Loudermill was not denied due process since he did have a hearing within three (3) months after he was terminated. However, once an employee is discharged, he not only is entitled to a prompt hearing, but also a prompt disposition of his appeal. Barry v. Barchi, supra, p. 61.

Loudermill's discharge stated that he was terminated for "dishonesty." As Justice Frankfurter stated in his concurring opinion in Anti-Facist Committee v. McGrath, 341 U.S. 123, 168 (1951):

> The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

When a person's good name, reputation, honor or integrity is at stake, because of

what the government is doing to him, notice and an opportunity to be heard are essential. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The suggestion of the Court of Appeals, in their Opinion herein, that the employee can file the extraordinary writ of mandamus is totally inaccessible to the average person for three reasons: (1) The financial ability of the individual would probably not be sufficient to hire competent counsel; (2) The complexities of a mandamus action are beyond the limitations of the average attorney, and (3) The granting of a writ of mandamus is discretionary with the court, and is rarely issued.

Certainly, the ability of the individual to protect himself against governmental arbitrariness is not nearly comparable to the awesome power, resources, and staying ability of the government in preventing him from succeeding - resulting in this Court's position that the ability of an individual to protect his own interest does not relieve the government of its constitutional obligations. For example, see Mennonite Board of Missions v. Adams, ___U.S.___, 103 S. Ct. 2706, 2712 (1983), which required personal or certified mail notice of a tax sale to mortgagees, even

though sophisticated creditors could discover that taxes were owing, and that the property would be sold. To the same effect, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981), where it was held that the fact that a wife could take steps to prevent a sale of her jointly owned property by her husband, did not validate a statute that permitted a husband to transfer jointly owned property without his wife's consent.

To be "deprived" of something is to have "lost" something. In a superb Bantam Book (that is one of this author's favorite books) entitled, How to Survive the Loss of a Love; a psychiatrist, psychologist and a poet combine their perspectives to explain the inner wound of a loss, and the healing process that must be undergone for recovery. Losses are categorized, and among the most hurtful of all losses is "Limbo."

> It is important to note that the feeling of being "in limbo" is in itself a loss ... Realize that "not knowing" may be the worst torture of all.

For Loudermill, everything would have ended on November 3, 1980, when he received his surprise letter of termination, if he had done nothing thereafter - but he managed to obtain a quixotic lawyer to represent him.

Deprived of a pre-termination hearing, he was then kept "in limbo" by the government for nine (9) months until his administrative governmental rights were concluded. Accordingly, there was a double loss: the loss of his job, and governmental procedures that kept him "in limbo" for nine months - thereby preventing him from commencing the emotional healing process and getting on with his life.

However, of utmost importance is the fact that if Loudermill had simply accepted the letter of termination, and done nothing, there was no state statutory scheme or machinery which would have automatically given him a pre-deprivation or post-deprivation hearing, without the aid of counsel. It is highly possible that for many discharged civil servants, who do not think to employ counsel or who cannot afford to employ counsel; that their property interest in their governmental job ends with their letter of termination.

Concomitant with the reliability involved in determining whether the time for post-deprivation hearings is critical is the gravity of the loss as it affects the deprived person. Further consideration must be given to the subtle, but very real, frame of mind of both the deprived person and other poten-

tial employers in the market place.

The deprived person may very well have the hopeful, naive belief that once an impartial post-deprivation hearing is had, his discharge will be nullified, and he will be re-instated. Accordingly, his energies and resources are directed towards what once was, as he cannot reconcile his mind to the fact that his job may be lost forever. Once they hear my side of the story, I will be vindicated, he thinks to himself.

From the standpoint of a potentially new employer, there is the handicap of the stigma of discharge on the potential former governmental employee; and the concern that the potential employee may only be taking the job on a temporary basis until his former job is restored. The potential employer may also think about the costs of training the former governmental worker, and the delay involved until he becomes productive.

The situation is analogous to a loved one dying quickly, as contrasted with a loved one experiencing a lingering death. In the first instance, there is finality, and you can start the healing and recovery procedure immediately; whereas, in the latter instance, finality only comes after long suffering, and the healing process is thereby delayed.

Query: Is it the purpose of government to engage in quick and final euthanasia by treating a discharged civil servant humanely, or is it the purpose of government to be indifferent and prolong the emotional damage by delaying the date when the recovery process can commence?

THE LIBERTY INTEREST

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals thrash;
'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.
Shakespeare's "Othello,"
Act III, Scene iii, Line 155

Counsel has always believed that in our Constitution, life, liberty and property was never intended to be three separate entities, but three interrelated threads that are so tightly interwoven as to comprise the very fabric of that document. Nor was priority given to those three words because of their sequence; so that life rates above liberty which rates above property. To the contrary, historically, constitutional emphasis was conceived on the paramount rights of the free and law-abiding citizen , who did not commit crimes against society, being able to enjoy life and liberty, and pursuing and obtaining happiness and safety. In that context, life was broader in spectrum in our Constitution's history that merely being limited to life and

death. Yet, the life portion of our Constitution has been limited to capital punishment situations by interpretation. But, history does not support this narrow limitation.

For example, in the Magna Carta:

> No freeman shall be taken, or imprisoned or outlawed or exiled, or in any manner harmed, nor will we go upon him, nor will we send upon him, except by the legal judgment of his peers or by the law of the land. Clause 39
>
> To none will we sell, to none deny or delay, right or justice. Clause 40

In commenting on the Magna Carta, under the term "personal security" and "freedom from injustice," Blackstone defends "enjoyment of life, limb, body, health and reputation." 1 Blackstone Comm. 129. And further, "Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals." 1 Blackstone Comm. 134.

That life meant "the enjoyment of life," was then demonstrated in the Virginia Declaration of Rights, authored by George Mason, and adopted in June of 1776, wherein the document spoke of " ... the enjoyment of life and liberty." One month later, on July 4, 1776, the Declaration of Independence, auth-

ored by Thomas Jefferson, was adopted, and spoke of " ... life, liberty and the pursuit of happiness."

The total historical concept of a free citizen's life being insulated from governmental injustice was then embodied into the Bill of Rights in 1791 by James Madison using the words, "life, liberty and property."

Mason, Jefferson and Madison knew each other. They knew the heritage from which they drew their thoughts and language, and they most certainly knew each other's thinking and work. Accordingly, when Madison wrote the word "life" in the Bill of Rights, it seems clear to this writer that it was understood, by all who participated in the adoption of the Constitution, to mean "the enjoyment of life," and that the government was not to interfere with, impair or deprive a free citizen of his enjoyment of life without due process of law.

In Justice Stewart's concurring opinion in Roe v. Wade, 410 U.S. 113, 167-171 (1973), substantive due process and a liberty interest were relied upon, but it is respectfully suggested that it was a life interest that was involved. However, as argued above, the words, "life, liberty and property" were intended to be so homogenized as to now merge

the two questions presented in Loudermill's Cross-Petition.

> They [the makers of the Constitution] conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man.
>
> Olmstead v. United States, 277 U.S. 438, 478 (1928)

Unlike the employee in Board of Regents v. Roth, 408 U.S. 564, 573 (1972), Loudermill was terminated for "dishonesty," which foreclosed him from taking advantage of other employment opportunities. It is not the defamation itself that rises to a constitutional level, but the defamation in the deprivation of a previously recognized status. As this Court stated in Paul v. Davis, 424 U.S. 693, 711 (1976):

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But

> the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions .....

In order to further the purposes of the federal civil rights act, 42 United States Code Section 1983, rules governing the compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question, and the common law rules are applicable. Carey v. Piphus, supra, p. 259.

When legal rights have been violated, and a federal statute provides a general right to sue for such violation, the federal courts may use any available remedy to make good the wrong done. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). Also see, 42 U.S.C. Sec. 1988.

There is no logical reason as to why a person, whose federally guaranteed rights have been violated, should be granted a less restrictive remedy than a person asserting an ordinary tort cause of action, Smith v. Wade, ___U.S.___,___, 103 S. Ct. 1625, 1636 (1983),

and a person is deprived of a "liberty" interest protected by the Due Process Clause when he is terminated for reasons that foreclose his opportunity to take advantage of future employment situations. Board of Regents v. Roth, supra.

The requirement of "publication" must be equivalent to the common law requirement that the defamatory statements be communicated to another party, and the refusal of potential employers to hire Loudermill, upon obtaining the reason for his termination from the Cleveland Board of Education, is sufficient.

In Goss v. Lopez, 419 U.S. 565 575 (1975), this Court, in dealing with the constitutional implications of the disciplinary suspension of high school students, said:

> If sustained and recorded, those charges could seriously damage the students standing with their fellow pupils and their teachers, as well as interfere with later opportunities for higher education and employment.

The right to continued employment involved herein is at least as substantial as the right to education involved in Goss v. Lopez, supra; see Logan v. Zimmerman Brush Co., et al., 455 U.S. 422, 431 (1982), and, by virtue thereof, Loudermill was also entitled to pre-

deprivation procedures for the deprivation of a constitutionally protected "liberty" interest.

A SUGGESTED SOLUTION

> Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932)

The State of Ohio has taken special precautions to comply with federal constitutional requirements in a criminal prosecution, so that if a trial is not held within a certain period of time, the accused goes free. The State of Ohio has also placed a time limitation on the post-termination hearing of a classified civil service employee. See Ohio Revised Code Sec. 124.34, (to be found in the

Petition for Writ of Certiorari in Case No. 83-1362 on Page A4, footnote 2).

In criminal proceedings (where there may be a life, liberty or property interest involved), a dismissal of the charges is the only remedy for the denial of a right to a speedy trial, see Strunk v. United States, supra; and, by analogy, a disaffirmance of a termination order would be an effective remedy for the denial of a pre-deprivation hearing or an automatic prompt post-deprivation hearing and disposition.

Additionally, the thirty (30) day requirement of Ohio Rev. Code Sec. 124.34, supra, within which a post-deprivation hearing is to be had, is a reasonable time limitation for an appeal hearing and a near immediate decision, due to the similarity of a criminal trial proceeding. If a judge in a criminal proceeding (with or without a jury) can render a verdict upon the conclusion of all the evidence, then there is no justifiable reason why an administrative body or their delegated official cannot do likewise in a post-deprivation proceeding.

CONCLUSION

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.
>
> Abrams v. United States, 250 U.S. 616, 630 (1919)

In 1940, there were 4.47 million governmental employees (federal, state and local) in the United States; whereas in 1980, there were 16.2 million, or an increase of 262% in governmental employees during that forty year period.

In 1940, the population of the United States was 132.6 million, whereas in 1980, it had increased to 227 million, constituting an increase of 71% in the population.

Stated in another manner, since 1940, governmental employees have increased 3.7

times faster than the population of the United States. Statistical Abstract of the United States, 1984, Employment Series GE No. 1, and Current Population Reports, series P-25, Bureau of the Census.

It is now 1984, but we have not arrived at the "Big Brother" type of government fictionalized by George Orwell. Nevertheless, we have possibly arrived at a type of government that can be described as "Little Mother" in that the day of the rugged individualist of colonial times, who asked very little from his government, has progressively changed to a present day society that expects, demands and needs more from government - whether it be retirement security, medical care, welfare or employment and job security.

As Justice Oliver Wendell Holmes, Jr. stated in Abrams v. United States, supra, and whose words are even more timely today than they were in 1919, the simple truth of the matter is that government now has assumed the responsibility of caring for and about those governmental employees who serve it and make it function. Indeed, if the government cares about those who cannot care for themselves, then there is a higher responsibility for government to care about those who make the governmental machinery work for those who now

need governmental care, or may need it in the future. Otherwise, the arduous ascent and emotional beatings that Loudermill has experienced in getting to this Court are meaningless, if those governmental employees who follow him find themselves in the same predicament he found himself in on November 13, 1980.

The pressured administrative appeal that should have happened without the intervention of an attorney, the wait, the incredibly uncomfortable benches, the limbo, the inability to obtain other employment due to the stigma, the callous and indifferent attitude towards the federal Constitution and this Court by administrative entities and appellate bodies, and the ultimate realization that no one is willing to listen to your side of the story, or really cares. Vicariously, this writer does not want to experience that helpless frustration again.

Surely, one who serves his government deserves more, and should expect more from his government, than arbitrary, high-handed treatment.

It's a secure feeling to be an "in," but it's a grievous hurt to wake up one morning to find that you're an "out," and there is no immediate recourse or relief available.

Loudermill, on behalf of himself and all future Loudermills, respectfully asks that this Court answer in the affirmative to the two questions he has had the privilege of posing in this, his Cross-Petition Brief.

Respectfully submitted,

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No. 83-6392

In the Supreme Court of the United States

October Term, 1983

JAMES LOUDERMILL,
Petitioner,

vs.

THE CLEVELAND BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS THE CLEVELAND CIVIL SERVICE COMMISSION AND THE CITY OF CLEVELAND

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment compels a final, unappealed judgment within nine months of initiation of an administrative appeal by a school board security guard discharged for dishonesty?

2. Whether a discharged school board security guard can collaterally challenge an unappealed administrative agency adjudication of dishonesty by a complaint which fails to allege publication of false information?

PARTIES

The Plaintiff-Appellant in the Court of Appeals was James Loudermill. The Defendants-Appellees in the Court of Appeals were the Cleveland Board of Education (John Gallagher, President), the City of Cleveland (George V. Voinovich, Mayor), the Cleveland Civil Service Commission (Thomas R. Skulina, President), and William J. Brown (Attorney General of the State of Ohio). The Attorney General was named in the complaint; but, none of the allegations pertained to the State of Ohio, no relief was sought against the State of Ohio, and the State of Ohio did not participate in the proceedings before the Court of Appeals. In this brief, Petitioner James Loudermill is referred to as "Loudermill." Since Respondent City of Cleveland appears in this case only because Respondent the Cleveland Civil Service Commission is alleged to be an agency of the City, these Respondents are jointly referred to as "the Commission."

TABLE OF CONTENTS

Appendix:

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

No. 83-6392

In the Supreme Court of the United States

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OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 17, 1983, is reported at 721 F.2d 551 and appears in the Petition Appendix, pp. A1-33 (Case No. 83-1362). The November 6, 1981, Memorandum and Order of the United States District Court for the Northern District of Ohio, and that Court's February 22, 1982 Memorandum and Order denying Petitioner's Motion to Alter or Amend Judgment, neither of which are officially reported, both appear in the Petition Appendix, pp. A34-49 and A50-62, respectively.[1]

1. In this Brief, the Petition Appendix (Case No. 83-1362) is cited as "Pet. App. p. .....", the Joint Appendix (Case Nos. 83-1362, 83-1363 & 83-6392) is cited as "Joint App. p. .....", and the attached Appendix to Respondents' Brief (Case No. 83-6392) is cited as "App. p. ....."

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on November 17, 1983 (Pet. App. pp. A1-33). A timely Petition for a Writ of Certiorari was granted by the Court on May 21, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

2. Ohio Revised Code §124.34, the statute at issue in this case, states in pertinent part as follows:

> Tenure of office; reduction, suspension, and removal; appeal
>
> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness,

immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections, or the rules of the director of administrative services, or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under Section 102.06 of the Revised Code constitute a violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by Section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision

of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

3. One section of the Ohio Revised Code and several rules of the Cleveland Civil Service Commission are cited as relevant background information and reprinted in the attached Appendix to this brief. These provisions are: R.C. §2739.02 Defenses in actions for libel and slander; Rule 9.40 Hearing before the Referee; Rule 9.41 Postponement of [*sic*] Continuance of Hearing; Rule 9.60 Appeal To The Commission; and Rule 9.70 Rules of Procedure for Appeal Hearing. Although rules are cited to the Revised Edition, November 1, 1982, the above rules were in effect during Loudermill's hearings before the Commission.

STATEMENT OF THE CASE

On October 27, 1981, Loudermill lodged a 42 U.S.C. §1983 Complaint in the United States District Court for the Northern District of Ohio. As to defendant Commission, he claimed that he was denied a "speedy resolution" of his statutory appeal of his discharge for dishonesty from his job as a security guard for the Cleveland Board of Education ("the Board"). He further claimed that this lack of a "speedy resolution" denied him due process under the Fourteenth Amendment to the United States Constitution.

Loudermill's complaint allegations (Joint App. pp. 6-12) included:[2]

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2. Since the District Court dismissed this case *sua sponte* based on the complaint allegations, those allegations have been and should be accepted as true for purposes of appellate review.

14. On September 25, 1979 the plaintiff filled out an application for a non-teaching position as a security guard with said defendant [the Board].

15. The plaintiff stated in said application that he had never been convicted of a felony and he was hired as a security guard with the Business Department of the Defendant Cleveland Board of Education . . . .

• • • • •

17. A record check was conducted on all employees in said department in October, 1980 which revealed that the plaintiff was convicted of grand larceny in 1968.

18. On November 3, 1980, George Mazzaro, Business Manager for the Defendant Cleveland Board of Education sent a letter to the plaintiff advising him that he was being removed from his employment for dishonesty.

• • • • •

20. The plaintiff filed a Notice of Appeal of his removal with the defendant Cleveland Civil Service Commission on November 12, 1980. A hearing before a referee of said defendant was originally scheduled for January 22, 1981 but was continued until January 29, 1981 when a hearing was actually held.

21. The referee filed and served his recommendations on or about April 1, 1981. A hearing was held before the full civil service commission on July 20, 1981 which announced its decision that it would affirm the plaintiff's removal.

22. The defendant Cleveland Civil Service Commission approved a proposed findings of fact and conclusions of law on August 10, 1981 and advised plain-

tiff's attorneys of said fact by letter dated August 21, 1981.

Finding no basis for the claimed denial of due process under these allegations and applicable law, the District Court *sua sponte* dismissed the Complaint on November 6, 1981 (Pet. App. pp. A34-49).

Loudermill then joined with Richard Donnelly, Respondent in companion case No. 83-1363, and filed a joint Motion to Alter or Amend Judgments, which was denied by the District Court on February 22, 1982 (Pet. App. pp. A50-62).

Loudermill appealed to the United States Court of Appeals for the Sixth Circuit which on November 17, 1983, reversed the decisions of the District Court as to the Board, but *affirmed* the decisions of the District Court as to the Commission (Pet. App. pp. A1-33; A63-64).

On May 21, 1984 this Court granted the Petitions for Writ of Certiorari of Petitioner Board and Cross-Petitioner Loudermill.

SUMMARY OF ARGUMENT

Since Loudermill and the Board both had a right to appeal the Commission's adjudication through four levels of state and federal courts, the Commission lacked the power to compel any resolution, much less a "speedy resolution" of Loudermill's claim.

Loudermill's two hearings, over approximately nine months, encompassed the full panoply of due process rights and did not offend the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974); Civil

Service Commission Rules, 9.40-9.41, 9.60-9.70 (Rev. ed. November 1, 1982) (App. pp. A1-4).

Loudermill did not plead that the Commission published false statements about his dishonesty, and the Commission's unappealed adjudication of his dishonesty conclusively bars this collateral attack on its determination. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966).

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ELEVATE TO A CONSTITUTIONAL MANDATE LOUDERMILL'S PREFERENCE FOR "SPEEDY RESOLUTION" OF LITIGATION HE INITIATED.

Loudermill is suing the "judge" (the Commission) in another proceeding he initiated because the Commission's ruling was not "speedy" enough to please him. Apparently he was not sufficiently displeased with the Commission's adjudication of his dishonesty to exercise his statutory right to appeal that decision to the Court of Common Pleas (state trial court). R.C. §124.34. Instead, he filed this collateral action to voice his displeasure.

The only reason there was a "resolution" as early as nine months after he filed his administrative appeal was that he elected to forego his appellate rights.[3] The Com-

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3. Following the Commission's adjudication, Loudermill could have appealed to the Court of Common Pleas, R.C. §124.34, and following a proceeding in that Court either the Board or Loudermill could have appealed to the State Court of Appeals and subsequently sought review in the Ohio Supreme Court and this Court. *See, State, ex rel. Henderson v. Civil Service Commission*, 63 Ohio St. 2d 39, 41, 406 N.E.2d 1105, 1106 (1980).

mission's adjudication thereby became a final, unappealed factual determination of Loudermill's dishonesty.

Loudermill's due process rights did not include the Board relinquishing its right to appeal through four more levels of Court review prior to final "resolution" of his administrative appeal. Therefore, he had no constitutional right to a "speedy resolution" in his favor in less than nine months.[4]

Both courts below, in entering judgment for the Commission, agreed that analysis of Loudermill's due process attack on the Commission must be more than an academic exercise. It must be an analysis that considers limited resources and burgeoning dockets in the real world.

Citing *Arnett v. Kennedy*, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), the District Court held:

> Since this court is well aware of the congested nature of the dockets of administrative agencies such as the Cleveland Civil Service Commission, the court holds that the delay which occurred in processing Loudermill's appeal in the instant case did not constitute a violation of his procedural due process rights. (Pet. App. pp. A41-42.)

Similarly, the Court of Appeals noted "the Commission's delay in Loudermill's situation probably stemmed from administrative backlog . . ." (Pet. App. p. A29 n.19). Citing *Arnett* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court of Appeals held:

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4. No authority is necessary to support the proposition that it is almost impossible to "resolve" a dispute in a single court or administrative agency within nine months much less proceed through an agency and four courts in less than nine months.

> While we do not condone the delays in the two cases [*Donnelly* and *Loudermill*] before us, we hold that neither delay violated due process. (Pet. App. p. A30.)

As this Court well knows, dockets of administrative agencies and courts have increased substantially since *Arnett* and *Mathews* were decided.

Since the Commission cannot deprive any party, Loudermill or the Board, of its right to appeal, the Commission was as a matter of law incapable of mandating any "resolution," much less a "speedy resolution," of Loudermill's claim.

This Court should affirm the judgments of both courts below that the procedures of the Commission did not deny Loudermill due process.

II. LOUDERMILL FAILED TO PLEAD THAT ANY FALSE STATEMENTS ABOUT HIM WERE PUBLISHED BY THE COMMISSION, AND ITS UNAPPEALED ADJUDICATION OF HIS DISHONESTY CANNOT BE COLLATERALLY CHALLENGED IN THIS CASE.

A. Loudermill Failed to Plead That the Commission Published False Statements About Him.

The complaint is totally devoid of allegations that the Commission published false statements about Loudermill (Joint App. pp. 6-12).

This reading of the complaint was confirmed by the district court (Pet. App. p. A58):

> [S]ince it is necessary for the purpose of establishing entitlement to due process protection of a "liberty" interest in his reputation for a plaintiff to provide that "in the course of terminating his employment, the

> agency prepared a report . . . which was (a) false, (b) stigmatizing, and (c) published," *Hufsttutler* [sic] *v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979), (footnotes omitted); *Paul v. David*, 424 U.S. 693, 96 S. Ct. 1155 (1976); *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882 (1977); *Board of Regents v. Roth*, *supra*; *Bishop v. Wood*, 426, U.S. 341, 96 S. Ct. 1074 (1976), and neither Loudermill, nor Donnelly, alleged either falsity or publication, their claims that they were deprived of their protected "liberty" interests in their reputations are facially meritless.

This reading of the complaint was also confirmed by the Court of Appeals (Pet. App. p. A27 n.18):

> [W]hile the discharge of Loudermill might be considered stigmatizing, he failed to allege that the reasons for his dismissal were "published", a prerequisite to any liberty interest claim. *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979). Accordingly, we affirm the district court's dismissal of those parts of the complaints which it construed as raising a Fourteenth Amendment liberty interest.

Clearly, Loudermill cannot foist liability on the Commission by invoking the Commission's adjudicatory power to determine his dishonesty, and then base a damage claim on the exercise of that power. The absolute immunity from damage claims applicable to judicial proceedings and orders, *Dennis v. Sparks*, 449 U.S. 24 (1980) (invalid injunction order in civil suit); *Stump v. Sparkman*, 435 U.S. 349, *reh'g denied*, 436 U.S. 951 (1978) (*ex parte* sterilization order), extends to administrative adjudications by the Commission. *See, Butz v. Economou*, 438 U.S. 478, 514 (1978) (federal agency officials performing adjudicatory functions are absolutely immune).

This Court should affirm the determination of the courts below that Loudermill cannot assert a claim totally foreign to his complaint.

B. The Truth of the Commission's Unappealed Adjudication of Loudermill's Dishonesty May Not Be Challenged in This Collateral Proceeding.

Loudermill's reference to "defamatory statements" (Loudermill brief at 27) ignores that truth is a "complete defense" to a claim of defamation under Ohio law. R.C. 2739.02 (App. p. A1).

He alleges that he was "removed from his employment for dishonesty." (Joint App. p. 9). He also alleges that, following hearings before a referee and the full Commission,[5] the Commission "announced its decision that it would affirm the plaintiff's removal." (Joint App. p. 10).

Loudermill did not challenge by appeal this adjudication of his dishonesty. Therefore, the fact of his dishonesty has been conclusively determined. As the Court of Appeals said (Pet. App. A18 n.12):

> The facts adjudicated at the administrative hearing do have collateral estoppel effect. *See generally United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *see also* Restatement (Second) of Judgments §83(s) comment b (1982).

In *Utah Construction & Mining Co.*, 384 U.S. *supra* at 422, this Court held conclusive the factual determination of the federal Board of Contract Appeals, stating:

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5. Under Rules of the Civil Service Commission Rules, Rules 9.40-9.41, 9.60-9.70 (Rev. ed. November 1, 1982) (App. pp. A1-4), Loudermill enjoyed comprehensive due process protection in the adjudication of his dishonesty.

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

This Court should confirm that, having adjudicated the fact of Loudermill's dishonesty, the Commission may not now be subject to liability for "defamatory statements" concerning his dishonesty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, which affirmed the judgment of the District Court as to Defendant Cross-Respondents Cleveland Civil Service Commission and City of Cleveland, Ohio, should be affirmed.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

2739.02 Defenses in actions for libel or slander

In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages.

CIVIL SERVICE COMMISSION RULES

9.40 Hearing Before the Referee. At the hearing before the Referee, Civil Service Commission, the discharged, suspended or reduced officer or employee shall be heard in person and may be represented by counsel in his own defense and may support the same by testimony of witnesses. At the conclusion of such hearing, or within five (5) work days, the Referee shall submit findings of fact, conclusions of law and recommendations to the Director in the City Service. Upon review of the facts, conclusions and recommendations by the Referee, the Director may sustain, modify or overrule the action of the appointing authority in the city service in discharging, suspending, or reducing the officer or employee concerned.

In any event, within five (5) work days from the date he receives the facts, conclusions and recommendations from the Referee, the Director shall forward his written decision to the Commission and to the officer or employee.

In the event the discharged, suspended or reduced officer or employee was at the time of separation from

service, under indictment for a felony or charged with a misdemeanor involving moral turpitude, either the appointing authority or the said officer or employee shall be granted a postponement of the hearing required by these rules, until after the aforementioned alleged violation of law has been adjudicated, by timely filing a request with the hearing officer.

9.41 Postponement of Continuance of Hearing. The referee may postpone or continue any hearing provided for in Rule 9.40 upon the request of any party or upon the referee's own motion, for good cause shown, but no postponement or continuance shall be granted for a period longer than ten (10) days. Further continuances shall not be granted unless either party makes such request, in writing, to the referee at least three (3) days prior to the scheduled hearing date, setting forth the reasons therefor, and the referee shall have sole discretion whether to grant or refuse such request and shall notify the parties accordingly. No continuance shall be granted for a period longer than ten (10) days.

The granting of a continuance to either party, as herein provided, shall not operate, in any manner, to prejudice the rights of either party to the proceedings.

9.60 Appeal To The Commission. Appeal to the Commission from the decision of the director in all cases provided for by the Charter, shall be deemed perfected when the officer or employee concerned shall file notice thereof in writing with the Commission within ten (10) days after such decision. The Commission shall be notified of such notices of appeal in the routine matters of the agenda.

Within seven (7) days after filing a notice of appeal from the decision of the Director, any party wishing to

introduce additional evidence shall notify the Commission in writing, including a list of witnesses and exhibits and an indication of the approximate length of time the presentation of such evidence will take. (Such new evidence shall not be a repeat of evidence already contained in the record). Such notice shall also be served upon opposing counsel or upon the other parties if they have no counsel. The Commission may refer the taking of such additional evidence to a Referee.

The Commission may convene a first meeting of counsel to discuss the procedural aspects of the full Commission hearing.

Failure to advise the Commission within seven (7) days of an intention to present such additional evidence, shall preclude that party from offering any evidence, except for rebuttal evidence if any other party presents additional evidence.

Within (10) days after all the additional evidence is taken, or if no additional evidence is offered, within seventeen (17) days after the notice of appeal is filed with the Commission, each party shall file a brief with the Commission setting forth each party's arguments and indicating the parts of the record supporting each party's position.

Any party who desires a copy of the transcript of any hearing, may purchase said copy from the court reporting firm present at the hearing. (Amended Min. 6-2-80)

9.70 Rules of Procedure for Appeal Hearing. After all evidence has been taken and the time limits for submitting briefs has expired, the Commission shall promptly notify each party of the time of hearing, allowing each

party fifteen (15) minutes for oral argument. Though the appeal is brought on behalf of an employee, the appointing authority has the burden of proof. Therefore, the appointing authority shall begin the argument and, after the argument of the appellant, may reserve a portion of its time for rebuttal. During the argument, any member of the Commission, after recognition by the President, may ask questions of any party or their counsel.

The Commission shall announce its decision after reviewing all of the testimony, exhibits, briefs and arguments of counsel.

The decision of the Commission shall be final upon its enactment of written Findings of Fact and Conclusions of Law. The prevailing party shall, upon request, prepare proposed written Findings of Fact and Conclusions of Law, which shall be voted upon and enacted by the majority of the Commission that had voted to sustain the prevailing party's position. The decisions of the Commission are final upon adoption of its minutes by the Commission. (Amended Min. 6-2-80)

Nos. 83-1362, 83-1363, 83-6392

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner
vs.
JAMES LOUDERMILL,
Respondent

PARMA BOARD OF EDUCATION,
Petitioner
vs.
RICHARD DONNELLY,
Respondent

JAMES LOUDERMILL,
Cross-Petitioner
vs.
CLEVELAND BOARD OF EDUCATION, et al.,
Cross-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF CLEVELAND FOUNDATION AS AMICUS CURIAE

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QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, THAT, ABSENT EXTRAORDINARY CIRCUMSTANCES, A CLASSIFIED CIVIL SERVICE EMPLOYEE BE GRANTED AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING PRIOR TO BEING DEPRIVED OF HIS PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT?

II. WHETHER DELAYS OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATE THE DUE PROCESS CLAUSE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union of Cleveland Foundation is a chapter of the American Civil Liberties Union, a nationwide, nonpartisan not-for-profit organization dedicated to the preservation of the civil rights and liberties guaranteed to all Americans by the Bill of Rights.

Since its founding in 1920, the American Civil Liberties Union, in furtherance of its historic mission, has appeared frequently in this Court and in other courts, as counsel for a party and as an amicus curiae, in cases raising due process challenges to federal and state

*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

governmental actions infringing upon protected property and liberty interests, including those of classified civil service employees.

In this case we ask this Court to reaffirm its numerous prior holdings that, absent an emergency, the due process clause of the fourteenth amendment requires some kind of hearing before an individual is deprived of a protected property interest. Amicus also asks this Court to hold that the due process clause requires a prompt post-discharge hearing.

STATEMENT OF THE CASE

The full factual background of the case and the opinion of the court below are reported in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983). Nevertheless, we believe it is important to set forth certain of the undisputed facts in detail.

Prior to their summary discharges by their municipal employers, James Loudermill and Richard Donnelly were classified civil service employees who could be discharged only for "cause" under the governing state statute, Ohio Rev. Code Ann. § 124.34 (Page 1978). Loudermill v. Cleveland Board of Education, supra, 721 F.2d at 551-552. Loudermill and Donnelly were summarily sent discharge notices by their municipal employers; neither was given any

opportunity to respond to the charge against him, either orally or in writing, prior to his discharge.

Loudermill and Donnelly were permitted to file an appeal with their respective civil service commissions following their discharge but neither appeal was "completed" until over eight months following the challenged discharge. Id. at 553-554. This delay did not violate state law inasmuch as the thirty-day time limit contained in Ohio Rev. Code Ann. § 124.34 (Page 1978) has been construed by the Ohio courts to be merely a guide and not a strict requirement. In re Bronkar, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (1977).

James Loudermill was hired by his municipal employer, the Cleveland Board

of Education, as a security guard in September, 1979. At that time he completed an employment application on which he responded "No" to the question, "Have you ever been convicted of a crime (felony)?". At the end of this application Loudermill signed a statement which provided in relevant part: "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge . . . ." Id. at 552. More than a year later a routine records check disclosed that Loudermill had been convicted of a felony in 1968, eleven years prior to his employment by the Cleveland Board of Education. Loudermill was then summarily notified by letter that he was being discharged on the grounds of dishonesty in filling out the employment application.

If Loudermill had been given any opportunity to respond to the charge before his discharge he claims he could have demonstrated his honesty and rebutted the charge against him inasmuch as he believed he had been convicted of a misdemeanor rather than a felony. Loudermill filed his appeal with the Cleveland Civil Service Commission nine days after his discharge. Id. at 553. Over eight months later the commission, by a vote of 3-2, affirmed Loudermill's discharge and rejected the recommendation of the referee that he be reinstated. The referee, the only official to hear testimony on the matter, specifically found that Loudermill had made an honest mistake concerning his conviction more than a decade before. See Loudermill's Cross-Petition for Writ of Certiorari at 2.

Richard Donnelly was employed as a bus mechanic by the Parma Board of Education. The Parma Board of Education summarily sent Donnelly a notice of discharge on August 17, 1977 because of his failure to pass an eye examination. The Board did not give Donnelly any opportunity whatsoever to respond to the charge, although he was afforded the chance to retake the eye examination. If, prior to his discharge, Donnelly had been given an opportunity to inform the Board that it still employed another bus mechanic who had failed the eye examination, the Board might have scrutinized the purported reason for the discharge and the efficacy of the eye examination requirement more closely and not discharged Donnelly. Thereafter Donnelly appealed his discharge to the

Parma Civil Service Commission which, after a delay of over nine months, ordered him reinstated, but apparently lacked the power to award back. pay. Loudermill v. Cleveland Board of Education, supra 553-554. The effect of Donnelly's reinstatement w.thout back pay was merely to convert his discharge into an uncompensated suspension. See Parma Board of Education's Petition for Writ of Certiorari at 5.

Thereafter Loudermill and Donnelly commenced the instant civil actions in federal district court, alleging that the defendants' failure to give them an opportunity before dismissal to challenge their discharges, as well as a prompt post-termination hearing, violated their fourteenth amendment rights to procedural due process. The United States District Court for the Northern District of Ohio,

John M. Manos, District Judge, dismissed both actions for failure to state a claim upon which relief can be granted. The cases were consolidated on appeal. With respect to the pre-termination due process claims the Sixth Circuit Court of Appeals reversed and held that a tenured municipal employee must be given some opportunity, either orally or in writing, to present evidence on his own behalf prior to discharge. No full-scale evidentiary hearing was required. In regard to the more than nine month delays in the post-termination appeal process the Sixth Circuit Court of Appeals found no constitutional violation and affirmed the District Court. Loudermill v. Cleveland Board of Education, supra, at 551-552. Thereafter, this Court granted the petitions and cross-petitions for certiorari.

SUMMARY OF THE ARGUMENT

In this case amicus urges this Court to reaffirm its consistent prior holdings that, absent extraordinary circumstances, the due process clause of the fourteenth amendment requires that a tenured government employee be given an opportunity to respond, orally or in writing, to the charge against him prior to termination. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984).

Any balancing of interests to determine whether the government employee is entitled to this fundamental right of a prior opportunity to be heard would be inappropriate. Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972). Nevertheless, there is a grave danger of error in summary termination decisions which can

be easily minimized by allowing the tenured employee an opportunity to respond to the charge against him. Cf. Goss v. Lopez, 419 U.S. 565 (1975). The tenured government employee has a significant interest in continued employment and the government's interest in an erroneous termination is nonexistent. The procedural protection sought here will impose no cognizable cost upon the State.

This Court should reaffirm its holdings that an individual may not be deprived of constitutionally guaranteed due process rights simply because the State did not statutorily provide them. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-432 (1983).

Finally, a delay of over nine months before a tenured government employee is

granted a decision on his post-termination administrative appeal is unreasonable and violative of the fourteenth amendment due process clause. Cf. Barry v. Barchi, 443 U.S. 55 (1979).

ARGUMENT

I. ABSENT EXTRAORDINARY CIRCUMSTANCES, THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING BEFORE AN INDIVIDUAL IS DEPRIVED OF A PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT.

The interest which we advance in this case was perhaps best summarized by Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170, 171-172 (1952) (concurring opinion):

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.
>
> . . . .

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

This Court has steadfastly held that some kind of hearing is required before a person is finally deprived of a protected property interest. See Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). In his survey of the elements of a fair hearing required by the due process clause, Judge Friendly concluded that a prior "Opportunity to Present Reasons Why the Proposed Action Should

Not Be Taken" is "fundamental". Friendly, supra, 123 U. Pa. L. Rev. at 1281.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), Justice Jackson, writing for the Court, concluded:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

It is the contention of amicus that a tenured government employee has a fundamental due process right to an opportunity to present reasons why he should not be terminated, either orally or in writing, before he is discharged. This Court has repeatedly recognized that

such a government employee has a right to some kind of hearing prior to discharge. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984); id. at 4960-4961 (Brennan, J., concurring in part and dissenting in part); Arnett v. Kennedy, 416 U.S. 134, 170-171 (1974) (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 & n.7 (1972).

In this case the Court is not asked to determine the full content of such pre-termination hearing. Instead this Court is only asked to confirm that a government employee is entitled to the same minimal pre-deprivation right to respond orally or in writing to the

charge against him which is guaranteed to public school students. See Goss v. Lopez, 419 U.S. 565 (1975).

A. This Court Has Consistently Held That, Absent Extraordinary Circumstances, The Due Process Clause Requires Some Kind Of Prior Hearing Whenever A Protected Property Interest is Invaded.

It is a fundamental principle of the English common law, the source of the due process clause of the fourteenth amendment, that an individual must be afforded an opportunity to be heard before being subjected to the deprivation of liberty or property. This is clear from the oft-cited statement of Lord Loreburn in Board of Education v. Rice, [1911] A.C. 179, 182:

> I need not add that . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who

> decides anything . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Indeed this principle is so basic that it is considered one of the few principles of "natural justice" from which no administrator may depart. See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 n.17 (1951) (Frankfurter, J., concurring).

It is not surprising, therefore, that this Court has consistently held that the due process clause requires, absent extraordinary circumstances, some kind of a prior hearing whenever the deprivation

of a protected property interest is threatened by the government.

In Goldberg v. Kelly, 397 U.S. 254 (1970), this Court ruled that, despite the fact that a terminated welfare recipient was entitled by statute to an adequate hearing within ten days, the due process clause required an administrative hearing prior to the termination of benefits. It is noteworthy that the pre-termination protections afforded welfare recipients and found inadequate in Goldberg were more extensive than those sought by the discharged government employees in the instant case. In Goldberg, the welfare recipient was entitled to seven (7) days written notice of intent to terminate benefits and the right to a personal meeting with a caseworker and to file a written statement

with a supervisor prior to the termination. Id. at 258-259. The tenured civil service employee in Ohio presently has none of these rights.

In Bell v. Burson, 402 U.S. 535, 542 (1971), the Court ruled that a hearing must precede the suspension of a driver's license. Again the procedures that the state statute provided were more protective than those afforded classified civil service employees in Ohio. The statute at issue in Bell at least granted a prior hearing on the issue of whether the person whose property was threatened was properly identified. In Ohio government employees are given no pre-termination protection of any kind.

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972) also support the

principle that the due process clause requires some sort of hearing prior to the deprivation of a protected property interest. In Fuentes tnis Court invalidated state pre-judgment replevin provisions on the ground that:

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.
>
> . . . .
>
> [T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place.

Id. at 82 (emphasis added). See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).[1]

1. In North Georgia Finishing the Court distinguished the intervening case of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), on the grounds that the

Fuentes did recognize that "truly unusual" and "extraordinary situations" could justify postponement of a hearing. 407 U.S. at 90. In such cases there must be "a special need for very prompt action." Id. at 91. Thus, this Court has not required a hearing prior to emergency action required by the exigencies of war, see, e.g., Bowles v. Willingham, 321 U.S. 503, 521 (1944); or bank failure, see, e.g., Fahey v. Mallonee, 332 U.S. 245 (1947). Similarly the court has found exigent circumstances where immediate action was necessary to protect consumers from contaminated food, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), or

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deprivation in Mitchell occurred only after the issuance of a writ by a judge and that state law provided for an immediate post-deprivation hearing. Neither ground is applicable in the instant case.

misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).[2]

None of these truly rare extraordinary circumstances are applicable here. Indeed, it cannot even be contended that summary discharge was necessary in this case to protect the government from serious disruption in the workplace. Cf. Goss v. Lopez, 419 U.S. 565, 582-583 (1975). Nor is the governing state statute limited to such exigent situations. In this case both the tenured government employees were valuable and efficient public servants who were summarily discharged for reasons which have not been shown to have been related to job performance.

2. See also Haig v. Agee, 453 U.S. 280, 309-310 (1981) (national security) and Bob Jones University v. Simon, 416 U.S. 725 (1974) (effective tax collection).

In Board of Regents v. Roth, 408 U.S. 564 (1972) this Court again recognized the general rule that some sort of prior hearing is required before a tenured government employee can be discharged:

> When protected interests are implicated, the right to some kind of prior hearing is paramount.

Id. at 569-570 (footnote omitted).

This holding in Roth is only just when this Court has held that a hearing is required before one's parole may be revoked, Morrissey v. Brewer, 408 U.S. 471 (1972), or a prisoner's "good-time" credits may be withheld, Wolff v. McDonnell, 418 U.S. 539 (1974). Again it should be emphasized that the government employees here are seeking less procedural protection than the Court found appropriate in Morrissey and Wolff.

Arnett v. Kennedy, 416 U.S. 134 (1974), is not contrary to the position of amicus herein. In Arnett, a majority of the justices of this Court explicitly found that the procedures statutorily afforded to the government employee there met the minimum requirements of the due process clause. See id. at 170-171 (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting). It is significant that in Arnett the statutory pre-termination procedures provided for access to the materials upon which the charge was based, the right to respond orally and in writing to the charges, and the right to present rebuttal affidavits. Id. at 140-143. The tenured government employ-

ees herein were given none of these protections and seek only the right to respond to the charge against them orally or in writing.

In essence the claim here is that tenured government employees facing the loss of their job are entitled to the same due process right to informally respond to the charges against them that this Court has granted to public school students facing a few days suspension from the classroom. See Goss v. Lopez, 419 U.S. 565 (1975).[3] It would be

3. Ingraham v. Wright, 430 U.S. 651 (1977), is not relevant to the instant case. Ordinarily disruption of the public institution is involved and the disciplinary infractions are directly observed by the teacher. Cf. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 n.24 (1978). In addition, common experience informs us that a child about to be paddled always expresses his side of the story, in one way or another.

perverse if a tenured teacher were held to have less due process protection than her student.

Neither Dixon v. Love, 431 U.S. 105 (1977), nor Mackey v. Montrym, 443 U.S. 1 (1979) are contrary to the position of amicus herein. Both involved exigent circumstances where the public safety required "the prompt removal of a safety hazard" from the roads and highways. Dixon v. Love, 431 U.S. at 114. Moreover, in Mackey this Court noted that a hearing was available contemporaneously with the suspension of the driver's license, 443 U.S. at 7, and "[a]t the very least, the arresting officer ordinarily will have provided the driver with an informal opportunity to tell his side of the story." Id. at 14. In the instant case the tenured government

employees are seeking no more due process protection than this Court assumed police officers afford suspected drunk drivers.

In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1978), a case dealing with summary termination of utility services, this Court again recognized the basic principle relied upon by amicus herein. It is axiomatic that a classified civil service employee facing the devastating loss of employment should be entitled to as much due process as a utility customer threatened with a loss of service. The tenured government employees herein are asking no more and, under the due process clause of the fourteenth amendment, are entitled to no less.

Three recent employment cases clearly support the fundamental principle that

the due process clause requires some kind of prior hearing. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1983), this Court held that a hearing is required before a claim for unemployment compensation can be denied. Furthermore, in Barry v. Barchi, 443 U.S. 55, 65 (1979), dealing with the suspension of a harness racehorse trainer's license, the Court, recognizing the need for some kind of pre-suspension due process procedures, held:

> [A]lthough Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the State's investigators. (Emphasis added).

Finally, in Davis v. Scherer, 52 U.S.L.W. 4956 (1984), four members of this Court found that the constitutional requirement of an opportunity to be heard prior to termination of a protected property interest in government employment was "'clearly established' long before October 25, 1977." Id. at 4960 (Brennan, Marshall, Blackmun & Steven, J.J., dissenting). The majority in Davis agreed that "the decisions of this Court by 1978 had required 'some kind of hearing' . . . prior to discharge of an employee who had a constitutionally protected property interest in his employment." Id. at 4958. Indeed, the disagreement between the majority and dissent, insofar as it is relevant here, focused on whether the due process requirement of a prior opportunity to be

heard was satisfied where the employee "was informed several times of the Department's objection . . . and took advantage of several opportunities to present [his response]." Id. This, of course, was far more due process than the tenured government employees in the instant case were given or are asking.

This Court's holdings in Hudson v. Palmer, 52 U.S.L.W. 5052 (1984) and Parratt v. Taylor, 451 U.S. 527 (1981) are not contrary to the position of amicus. In this case there existed neither the "necessity for quick action by the State" nor the "impracticability of providing any meaningful predeprivation process." Id. at 539. Hudson and Parratt by their terms only apply when the deprivation of property is caused by the random and unauthorized conduct of a

state employee. Hudson v. Palmer, 52 U.S.L.W. at 5056.

In essence, it is the position of the amicus herein that, at a minimum and in the absence of extraordinary circumstances, classified civil service employees with a protected property interest in their government employment should not be confronted with an impersonal, autocratic, and unexplained administrative decision that leaves them bewildered, confused, and jobless, and then have to wait months for a post-termination hearing in order to have an initial opportunity to correct or clarify what might well be a bureaucratic error. Simply stated, the due process clause of the fourteenth amendment requires that such a government employee be given, at a minimum, an opportunity to respond, ver-

bally or in writing, to the charge against him prior to his termination. See Davis v. Scherer, 52 U.S.L.W. 4956, 4958 (1983); id. at 4960 (Brennan, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 n.7 (1972). Cf. Goss v. Lopez, 419 U.S. 565 (1975).

B. A Balancing Of The Magnitude Of The Private Interest In Continued Government Employment, The Grave Risk Of Erroneous Deprivation And The Insubstantial Government Interest In Routine Summary Dismissals Of Its Employees Confirms The Constitutional Requirement Of A Prior Opportunity To Respond.

In Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976), this Court held:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official

> action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Although a balancing of the Mathews factors strongly supports the efficacy of an opportunity to respond, orally or in writing, prior to the termination of a protected interest in government employment, such a balancing would be inappropriate in the instant case. This Court has repeatedly held that the Mathews balancing test is relevant only to the issue of the specific dictates of due process, not to the recognition of the

fundamental right to some kind of prior hearing. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-434 (1983); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16-17 (1978); Goss v. Lopez, 419 U.S. 565, 575-576 (1975). This basic principle was most clearly stated by this Court in Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972):

> The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. . . . . But some form of notice and hearing--formal or informal --is required before deprivation of a property interest that "cannot be characterized as de minimis." Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J. concurring) (emphasis in original).

In Matthews this Court only proceeded to balance the relevant factors after it

had first decided: "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." 424 U.S. at 333. This Court thereafter engaged in the balancing of interests only to determine whether Eldridge was entitled to more than merely an opportunity to comment in writing prior to the termination of his Social Security benefits. Id. at 324, 338, 346.

In the instant case the Ohio classified civil service employees were denied any right to respond to the charge against them, either orally or in writing, prior to their termination. Thus, since the issue in this case is simply the availability of the most minimal due process rights, it would be inappropriate for the Court to engage in a balancing of the factors test.

It is equally clear, however, that a balancing of the relevant factors set forth in Mathews simply confirms the constitutional necessity of guaranteeing an opportunity to respond, orally or in writing, prior to the termination of protected government employment. It cannot be doubted that the private interest in continued government employment, by those who have a protected property interest in their jobs, is significant. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1983).

Justice Marshall eloquently explicated the gravity of a loss of employment in Arnett v. Kennedy, 416 U.S. 134, 220-21 (1974) (dissenting opinion):

> Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . The loss of

> income for even a few weeks may well impair their ability to provide the essentials of life--to buy food, meet mortgage or rent payments, or procure medical services. . . .
>
> A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected.

Moreover, there are important intangible private interests at stake when a tenured government employee is discharged. As the court below recognized, "Employment provides not only financial livelihood, but frequently self-esteem and social status." Loudermill v. Cleveland Board of Education, 721 F.2d 550, 561 (6th Cir. 1983). Finally, a tenured government employee has a significant interest in "being personally talked to about the decision rather than

simply being dealth with." L. Tribe, American Constitutional Law 504 (1978) (emphasis in original). In other words, the due process clause, in addition to serving to prevent erroneous deprivations, also has as a central purpose "the promotion of participation and dialogue by affected individuals in the decision-making process." Marshall v. Jerrico, Inc., 446, U.S. 238, 242 (1980).

It is irrelevant that the deprivation may be only temporary. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, 407 U.S. 67, 82 (1972), quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972).

The second factor of the Mathews balancing test, the gravity of the risk

of erroneous deprivation absent procedural protection, also compels the conclusion that, at a minimum, the due process clause guarantees a tenured government employee the opportunity to respond to the charge against him prior to termination of employment. The present Ohio system of summary termination is the essence of arbitrariness inasmuch as it wholly substitutes a bureaucratic edict in place of reasoned factfinding. In the often highly charged atmosphere of the workplace, the possibility of an erroneous decision to terminate an employee is significant. Often such errors are the result of personal animosities, mistaken identity, unreliable information sources, cloudy memories or faulty perceptions. See Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting).

As this Court found in Goss v. Lopez, 419 U.S. 565, 580 (1975):

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.
>
> . . .
>
> But it would be a strange disciplinary system in [a governmental] institution if no communication was sought by the disciplinarian with the [employee] in an effort to inform him of his dereliction and let him tell his side of the story in order to make sure that an injustice is not done.

The validity of the Court's observation in Goss is confirmed by the wisdom of Justices Frankfurter and Holmes:

> [A]n admonition of Mr. Justice Holmes becomes relevant. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point." . . . ." The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." . . . Appearances in the dark are apt to look different in the light of day.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-171 (1951) (Frankfurter, J., concurring), quoting United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Frankfurter, J. dissenting).

Government employers are not immune to the same human vices and foibles that have given rise to a recognition of the need for due process protection in other

areas. They can and do make mistakes, they can and do act arbitrarily, discriminatorily and unconstitutionally. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Abraham v. Pekarski, 728 F.2d 167 (3rd Cir. 1984). Some degree of pre-termination procedural protection for the tenured government employee is essential.

A post-termination hearing is an inadequate substitute for a pre-termination opportunity to respond to the charge, not only because of the inherent delay and hardship to the individual but, more importantly, because there is a significant danger that the post-termination hearing may result in an after the fact rationalization for a

bureaucratic decision which has already been made. See L. Tribe, American Constitutional Law 544 (1978).

On the other hand, a pre-termination opportunity to respond to the charge operates as a significant protection against improprieties and errors by guaranteeing that the values of accuracy, accountability, visibility, integrity and consistency are met. Cf. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

Insofar as the third prong of the Mathews balancing formula, the weight of governmental interest, is concerned, it is clear that there is no substantial state interest in denying a tenured government employee the opportunity to respond to the charge against him before being discharged.

Any marginal, if not non-existent, administrative burden cannot outweigh the constitutionally protected right to due process. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 90 (1972); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Bell v. Burson, 402 U.S. 535, 540-541 (1971). This is particularly true where the minimal due process procedure sought to be imposed on the state is no more than that which would be self-imposed by any professional, conscientious administrator. Cf. Goss v. Lopez, 419 U.S. 565, 583 (1975):

> [W]e do not believe that we have imposed procedures on . . . disciplinarians which are inappropriate. . . . Instead, we have imposed requirements which are, if anything, less than a fair-minded [administrator] would impose upon himself in order to avoid unfair suspensions.

Moreover, the discharge of a tenured government employee imposes significant costs upon the government which cannot be ignored. Such a discharge causes the loss of all the personnel investments already made in the employee: recruitment, selection, training and evaluation. In addition, when the discharged employee is replaced the same costs must be incurred by the government a second time. If the terminated employee is later reinstated the government will then have to bear the burden of a returning employee imbued with cynicism and frustration over his unjust treatment. In brief, the government shares the individual's interest in a prompt and accurate pre-termination procedure. Cf. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

In conclusion, a pre-termination opportunity to respond to the charges against him will serve the interests of both the tenured government employee and the government employer at virtually no expense, and probably a net financial gain, for the government. See, e.g., Loudermill v. Cleveland Board of Education, 721 F.2d 550, 562 (6th Cir. 1983); Vanelli v. Reynolds School Dist., 667 F.2d 773, 779 (9th Cir. 1982); Thurston v. Dekle, 531 F.2d 1264, 1272-1273 (5th Cir. 1976).

C. An Individual May Not Be Deprived Of Constitutionally Guaranteed Due Process Rights By The Niggardly Procedures Afforded By A State Statute.

In the instant case it is undisputed that Loudermill and Donnelly have a protected property interest in their

government employment by virtue of Ohio Rev. Code Ann. § 124.34 (Page 1978) and could not be terminated other than "for cause". Simply because this property interest is created by a state statute, however, it does not follow that the State may emasculate the due process procedural guarantees mandated by the fourteenth amendment to the United States Constitution by the expediency of specifying lesser procedures in the same state statute.

Allowing the State to condition its grant of a property right upon inadequate procedural protections would be contrary to the entire corpus of this Court's right-privilege decisions. See W. Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Corn. L. Rev. 445, 462 (1977).

Requiring a government employee to forfeit his constitutionally guaranteed due process rights as a condition of acceptance of a statutorily conferred property interest would repudiate "one hundred years of settled Supreme Court practice . . . ." D. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calf. L. Rev. 146, 176 (1983), citing Pennoyer v. Neff, 95 U.S 714 (1878).

Fortunately tnis Court has consistently held that procedural provisions of state statutes do not govern whether an individual has a protected liberty or property interest or what procedural safeguards are necessary to protect that interest. See, e.g., Santosky v. Kramer, 455 U.S. 745, 755 (1982); id. at 775 (Rehnquist, J.,

dissenting); Vitek v. Jones, 445 U.S. 480, 490-491 & n.6 (1980); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell & Blackmun, J.J., concurring); id. at 185 (White, J., concurring in part and dissenting in part); id. at 211 (Marshall, Douglas & Brennan, J.J., dissenting). This clearly established principle has been stated most recently and forcefully in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982):

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980). . . . Indeed, any other conclusion would allow the State to destroy at will

> virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Vitek v. Jones, 445 U.S., at 490-491, n.6, quoting Arnett v. Kennedy, 416 U.S., at 167 (opinion concurring in part). (Brackets in original).

As a matter of simple justice and fundamental constitutional principle Ohio must not be permitted to condition its statutory grant of a protected property interest in classified civil service employment upon constitutionally inadequate statutory procedural provisions.

II. DELAY OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATES THE DUE PROCESS CLAUSE.

The fundamental requirement of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1908). If the opportunity to be heard is to have any significant import, it must be granted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

When the state deprives an individual of a property interest the length of wrongful deprivation is an important factor in assessing the impact of the official action on the private interest. Fusari v. Steinberg, 419 U.S. 379, 389 (1975). Furthermore, the rapidity of administrative review is a significant

factor in assessing the sufficiency of the entire process. Id. See also Gerstein v. Pugh, 420 U.S. 103 (1975).

Consequently, when a property interest is implicated, this court has declared particular administrative processes constitutionally adequate or inadequate contingent on the availability of a prompt hearing and prompt administrative disposition. Barry v. Barchi, 443 U.S. 55 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973).

Similarly this court has considered the adequacy and availability of pre-deprivation procedures in assessing the impact of delay in post-deprivation hearing and review. Where pre-deprivation procedure is meager, post-deprivation delay has been found

constitutionally intolerable. Cf. Goss v. Lopez, 419 U.S. 565 (1975).

The nine-month delay under consideration here differs drastically from the three-month delay tacitly approved in Arnett v. Kennedy, 416 U.S. 134 (1974), because of the obvious temporal disparity, and the conspicuous absence of any meaningful pre-termination procedural safeguards in the instant case. See id. at 137.

The administrative torpor under which a discharged public employee labors in Ohio is most acutely demonstrated through a chronicle of cross-petitioner Loudermill's experience. Loudermill was discharged by letter on November 3, 1980. He filed his request for a full hearing on November 12, 1980. On August 10, 1981, the Civil Service Commission

finally affirmed Loudermill's discharge after protracted administrative proceedings.

Amicus contends that a nine-month delay between discharge and the administrative resolution of that action is per se unreasonable and violative of the discharged employee's right to due process. A hearing clearly loses its capacity to be meaningful to the employee after such a prolonged delay and, instead, imposes an irreparable injury upon the discharged employee.

The public employee's interest in continued employment is a substantial one. Logan v. Zimmerman, 455 U.S. 422, 434 (1982). Once deprived of that employment, the discharged public employee, not unlike the license suspendee, has a significant interest in the

prompt disposition of the State's claims against him. See Barry v. Barchi 443 U.S. 55, 66 (1979). That the discharged public employee may seek other employment during that interim is at best a tenuous proposition. "The employee may not be able to secure a satisfactory position in the private sector, particularly a tenured one, and his marketability may be under a cloud due to the circumstances of his dismissal." Arnett v. Kennedy, 416 U.S. 123, 194 (1974) (White, concurring and dissenting). See also id. at 219 (Marshall dissenting).

Moreover, an Ohio public employee who is discharged for cause is precluded from seeking unemployment compensation. Ohio Revised Code § 4141.29(D); see also Christian v. New York State Department

of Labor, 414 U.S. 614 (1974). Similarly, the discharged government employee may be barred from collecting welfare benefits absent his willingness to liquidate significant personal possessions, including his home and car. Ohio Administrative Code §§ 5101:1-5-05, -06.

It is obvious that the longer the period between the discharge and the hearing the more devastating will be the impact of the loss of employment. A weekly paycheck may be the only thing that stands between the discharged employee and the forfeiture or repossession of his home, car and other possessions. Cf. Fuentes v. Shevin, 407 U.S. 67 (1972); Fusari v. Steinberg, 419 U.S. 379 (1975).

Therefore the notion that a wrongfully discharged employee may be made whole by eventual reinstatement and back pay, where that employee has been deprived of his regular income in excess of nine months, misperceives the full injury inherent in such a delay. Indeed the public employee may suffer virtually the full impact of the injury occasioned by the delay before he may contest his termination. See Barry v. Barchi, 433 U.S. 55, 66 (1979). See also Comment, Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees; 10 Harv. Civil Rights-Civil Lib. L. Rev. 472, 479.

The lower court observed that the employee could have, but did not, institute a mandamus action. Loudermill v. Cleveland Civil Service

Commission, 721 F.2d 550, 564 (1983). Amicus maintains that mandamus, while theoretically available, State ex. rel. Hamlin v. Collins, 9 Ohio St.3d 117 (1984), is an inadequate remedy for the discharged employee who awaits administrative review. Since mandamus is not available to enforce discretionary duties, Cf. Heckler v. Ringer, 52 U.S.L.W. 4547 (1984), mandamus would not be available to remedy the delay presented in this case, absent a court holding that such a delay violated the employee's due process rights. But in Ohio the statutory requirement that a hearing be held within thirty days, Ohio Rev. Code Ann. § 124.34 (Page 1978) has been held to be merely a guideline and not mandatory. In re Bronkar, 53 Ohio Misc. 13, 372 N.E.2d 1345 (1977).

In addition, the government's fiscal and operational interests would be best served by providing the discharged employee with a prompt post-termination hearing. Indeed, Ohio Rev. Code Ann. § 124.34 (Page 1978) constitutes the State legislature's own recognition of this fact by virtue of its specification that such a post-termination hearing be held within thirty days following discharge.

When the government employer discharges an employee, it must necessarily hire and train another individual to fill the vacancy left by the terminated employee.

The effect of any appreciable delay is two-fold where the discharged employee ultimately wins reinstatement. During the pendency of the appeal the replace-

ment employee may have acquired tenured status, and the State is liable for a back pay award to the wrongfully discharged employee as well as being liable for the wages of the replacement employee.

The longer the delay between discharge and hearing, the more expense will be incurred by the State in providing the hearing itself. All legal proceedings are expensive and the more protracted such proceedings become and the higher the stakes rise the more costs will be incurred by the State in prosecuting the case and providing the forum. Cf. Santosky v. Kramer, 455 U.S. 745, 763 (1982). The State cannot in good faith assert any counterbalancing savings arising from abandoned claims by discharged employees since it is clear

that the government has no legitimate interest in using delay as an instrument of economic duress.

Substantial delay in the provision of a post-termination hearing imposes significant and unnecessary costs, both financial and other, upon the discharged employee and the government. These costs far outweigh any illusory benefit thought to be gained.

Indeed, as this court concluded in Barry v. Barchi, 443 U.S. 55, 66 (1979):

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of [its initial termination decision].

CONCLUSION

Therefore, amicus respectfully requests this court to affirm the pre-termination procedures that the lower court found mandated by the due process clause. In a time of ever worsening individual alienation, and of an increasingly large, bureaucratic, and impersonal government, it is necessary to impose a constitutional mandate of civility, courtesy, and even humanity upon institutions not renowned for such characteristics.

Imposing such a requirement would cost nothing--it would simply make the administrator talk to an individual before taking action affecting him.

Additionally, amicus respectfully requests this court to reverse the lower

court and find that the substantial delay presented in this case was unreasonable, and violated the discharged employee's due process rights. In this case, justice delayed was indeed justice denied.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law. . . ."

2. Ohio Administrative Code § 5101:1-5-05 states, as follows:

> 5101:1-5-05 Personal property requirement for GR
>
> (A) The value of non-exempt personal property for general relief applicants/recipients is subject to certain maximum limitations.
>
> (1) The total value of all nonexempt personal property may not exceed two thousand two hundred fifty dollars for the individual or the assistance group.
>
> (2) In addition to the ceiling of two thousand two hundred fifty dollars on the total value of all

types of nonexempt personal property, there are sub-limits on liquid assets, life insurance, motor vehicles, and farm and business machinery.

(a) The individual/family may retain cash or other negotiable items convertible to cash (stocks, bonds, trust deeds) up to a total value of three hundred dollars. The limit applies to the total family included in the assistance group, not to the individual member of the family.

(b) Life insurance whose total cash surrender value is no more than five hundred dollars may be retained by each individual whose needs are included in the assistance grant. The cash surrender value of all policies in the assistance group combined with all other personal property cannot exceed two thousand two hundred fifty dollars.

(c) Any number of motor vehicles may be retained provided the total net value of all vehicles does not exceed one thousand two hundred dollars. Motor vehicles include auto-

mobiles, trucks, campers, vans, motorcycles, trailers, boats, snowmobiles, and motorboats.

3. Ohio Administrative Code § 5101:1-5-06 states, as follows:

5101:1-5-06 Real property requirement

A person may retain land and improvements (e.g., buildings) as long as it is being used to provide support for that person and provided the person has the right to possess, use, control or dispose of that property. Real property may be utilized in one of three ways:

(A) May be used as the person's home provided that:

(1) Value as determined by the county auditor as the market value minus encumbrances or liens does not exceed $12,000.

(2) The person's home is defined as the house used by the applicant/recipient and his spouse and the land adjoining which is not readily separable from the house.

(B) May be used to produce income for the support of the person provided:

(1) Annual net income produced equals at least six percent (6%) of the market value as determined by the county auditor; and

(2) Monthly net income produced is used for the support of the person.

(C) Must be sold and the proceeds used for the support of the person. This requirement will be considered met if the property is:

(1) Listed for sale at a value not less than the value determined by the county auditor as the market value, and

(2) No offer is refused that is at least 90% of the value determined by the county auditor as the market value.

4. Ohio Rev. Code Ann. § 124.34 states, in pertinent part, as follows:

Tenure of office; reduction, suspension, and removal; appeal

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services, or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a

violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to

hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

5. Ohio Rev. Code Ann. § 4141.29 states, in pertinent part, as follows:

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

(2) For the duration of his unemployment if the administrator finds that:

(a) He quit his work without just cause or has been discharged for just cause in connection with his work.